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ARBITRATING "ARBITRABILITY"

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ENERGY CENTER

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DRAFT: COMMENTS WELCOME

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The respective roles of courts and arbitral tribunals is, in one form or another, the foundational, primal question around which our whole law of arbitration revolves. True, there is nothing here that hasn't been said often before (and often enough----although that can hardly be thought to make things any better---by me). The outlines should be abundantly familiar by now. But the endless downpour of cases, and the overgrowth of commentary (inevitable after heavy rains) suggest that it may still be necessary to clear away some brush. It is somewhat easier for me to justify going over all this ground

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This piece was prepared for a presentation at the Institute for Transnational Arbitration/American Society of International Law program on "Gateway Issues in International Arbitration," held on April 3, 2013. It builds on, updates, and (I would certainly like to believe) improves on, a number of my earlier articles, notably Alan Scott Rau, "The Arbitrability Question Itself," 10 Amer. Rev. of Int'l Arb. 287(1999)[hereinafter *Rau, "Arbitrability*"]; Alan Scott Rau, Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions, 14 Amer. Rev. of Int'l Arb. 1 (2003) [hereafter *Rau, "Separability*"]; Alan Scott Rau, "Consent" to Arbitral Jurisdiction: Disputes with Non-Signatories, *in* Belinda Macmahon (ed.), Multiple Party Actions in International Arbitration: Consent, Procedure and Enforcement 69 (OUP 2009)[hereinafter *Rau, "Consent*"]; Alan Scott Rau, Understanding (and Misunderstanding) "Primary Jurisdiction," 21 Amer. Rev. of Int'l Arb. 46 (2010) [hereinafter *Rau, "Jurisdiction"*]; Alan Scott Rau, Arbitral Power and the Limits of Contract: The New Trilogy, 22 Amer. Rev. of Int'l Arb. 436 (2011) [*hereinafter Rau, "Trilogy*"].

A word about the title: I appreciate of course that the term "arbitrability" is highly fraught, and that our usage is completely at odds with the way the term is used in other legal systems; see Jan Paulsson, *Jurisdiction and Admissibility, in* GERALD AKSEN (ED.), GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER 601, 609 (2005)(our "persistent abuse" of this "vaporous locution" "has led to international disharmony, because elsewhere that word has an established meaning" referring to public policy limitations upon what it is legally permissible to arbitrate). I have in fact often suggested that the term "can easily be dispensed with," *Rau, "Separability"* at 120. But the idiom is well-entrenched, and in the absence of anything with a clearly superior claim---and allowing for the allure of alliteration—I am led to believe it does no great harm. I take "question of arbitrability" to mean, the question "whether there is 'a duty for the parties to arbitrate' the dispute---whether the parties have consented to a final arbitral judgment on the issues---whether, in short, the arbitrators have 'jurisdiction' to decide," *Rau, "Consent" at 71.*

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again, in this brief exercise, when I bear in mind Johnson's admonition that "men more frequently require to be reminded than informed."[1]

I. The "Gateway Issue"

> It is one of the maxims of the civil law, that definitions are hazardous.[2]

It is quite common, in the case law[3] and the secondary literature,[4] to characterize the issue we are addressing here in terms of "gateway" or "threshold" challenges to the arbitration of a commercial dispute. This frame has all the virtues of metaphor---as it reminds us with some vividness that we really have to be sure that it is proper to do so before subjecting an individual to the results of private adjudication. And it has all the dangers, as well---tempting us to mistake a vague image for some underlying reality. Like most metaphors it is rife with ambiguity: After all the notion of a "gateway" may, purely as a semantic matter, direct us

(1) to distinguish between issues that must be resolved *before a party can be permitted to proceed and fully adjudicate the merits of the dispute*---issues that may after all include such things as the non-payment of fees, or the untimely making of an application---and those that need not be.[5]

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1 Samuel Johnson, The Rambler No. 2 (March 24, 1750), in The Rambler 34 (1825 ed.).

2 Samuel Johnson, The Rambler No. 125 (May 28, 1751) in id. at 217.

3 See, e.g., Pacificare Health Systems, Inc. v. Book, 538 U.S. 401, 407 n.2 (2003)("If the contractual ambiguity could itself be characterized as raising a 'gateway' question of arbitrability, then it would be appropriate for a court to answer it in the first instance"); Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 452 (2003)("gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy," are presumed to be for the courts); Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83-84 (2002) (a "question of arbitrability" refers to the "narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate"; consequently "a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide").

Cf. AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 647 (1986)("the threshold question of arbitrability"); United Steelworkers of America v. American Manufacturing Co., 463 U.S. 564, 569 (1960)("it might be argued that a dispute as to the meaning" of a "standard" arbitration clause---calling for the arbitration of "any disputes. . . as to the meaning, interpretation, and application" of the agreement---is for the arbitrator; "but the Court rejects this position, saying that the threshold question, the meaning of the arbitration clause itself, is for the judge unless the parties clearly state to the contrary")"(Brennan, J., concurring).

4 Cf. George A. Bermann, The "Gateway" Problem in International Commercial Arbitration, 37 Yale J. Int'l L. 1, 3 (2012)(the task of "demarcating 'gateway' issues (i.e., issues that a court entertains at the threshold to ensure that the entire process has a foundation in party consent) from 'non-gateway' issues (i.e., issues that arbitral tribunals, not courts, must be allowed to address initially").

5 Cf. *Howsam*,, supra n.3, 537 U.S. at 84 ("[T]he Court has found the phrase 'question of arbitrability' *not* applicable in [certain] kinds of general circumstance where parties would likely expect that an arbitrator

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Or alternatively, it may ask us to distinguish between issues that must be resolved *before a party may even invoke arbitral jurisdiction*---and those that may instead be left to the arbitrators themselves. And here there are layers upon layers of ambiguity---for even within this second category, it is still frequently unclear whether:

(2) the metaphor of a "gateway" is being used to evoke what is a *logically prior* prerequisite to arbitral jurisdiction—asking us, that is, to distinguish between those issues that (whenever raised) *will condition the ultimate validity of an award*---and those that do not; or whether

(3) the term is being used, instead, to evoke what is merely *chronologically prior to arbitral proceedings*-----asking us, that is, to distinguish between those issues that (whoever will have the final word on the subject) must be resolved *before a party is permitted even to have access to the arbitral tribunal, or to initiate a proceeding*---and those that need not be.

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would decide the gateway matter"). The term does indeed appear to be occasionally used in this sense---for example, in a muddled comment to the effect that "the critical distinction remains between questions of arbitrability and 'gateway' issues," cf. 17 (11) World Arb. & Med. Rep., at 349 (Nov. 2006)(discussing a Florida case holding that whether a claim was barred by the statute of limitations was a matter for the arbitrators, notwithstanding a contractual provision to the effect that "in no event shall the demand for arbitration be made after the date" that the claim would be time- barred if brought in court).

So here it may well be the arbitral tribunal, just as easily as the court, which stands at the "threshold" and serves as the guardian of the adjudicative process. The fact that a claim has been asserted only when it is "too late," may indeed "keep the arbitration from going forward," but---*precisely because the question falls for decision by the arbitrators themselves* (as in *Howsam)*--- it should not be viewed as "jurisdictional" in any sense. *See also Rau, "Consent*," at 136-37("I have already written at some length about why assertions like these should not really implicate the 'jurisdiction' of the arbitrators"; "the parties should not have to run the risk of seeing a rule of liability converted into a rule of 'arbitrability"); JAN PAULSSON, THE IDEA OF ARBITRATION ch. 3 (forthcoming 2013)(a respondent's assertion that (a) "it never consented to give the supposed arbitrator any authority whatsoever," and its assertion that (b) "claims should be dismissed without substantive examination because liability is in any event barred by some legal or contractual impediment," are both "threshold issues in the sense that they deflect consideration of the claim," but the first is a "jurisdictional challenge" and the second is not).

For that matter, a private-law tribunal may deem the existence of an "investment" (or perhaps the claimant's status as an "investor") as "jurisdictional," *in the limited sense* that at a preliminary stage it will treat this "gateway" issue as separate from---and logically prior to---any determination ultimately made with respect to the substantive conduct of the respondent state ("the merits"). See Kenneth J. Vandevelde, Bilateral Investment Treaties: History, Policy, and Interpretation 466 (2010) ("the existence of an investment is a necessary condition of the tribunal's jurisdiction," and tribunals "typically discuss this as an issue of jurisdiction *ratione materiae*"); Christopher F. Dugan et al., Investor-State Arbitration 147-153 (2008)("common practice for arbitral tribunals . . . to separate the proceedings into two phases, such that a claimant must first overcome jurisdictional objections before presenting the heart of its case"). But it hardly follows that on a motion to vacate, a court at the seat must treat these questions as "jurisdictional" *in the more interesting sense that* it is entitled to refuse deference to the tribunal's finding and perform a *de novo* review. See the discussion at text accompanying nn. 169-71 infra.

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These last two questions are often conflated, but ought best be kept distinct.[6] Only the former, I think (that is, # 2 above), is truly challenging---or at least (I know this is not the same thing), only the former will be the principal focus of this paper. It is perhaps unfortunate that American procedure has tended to treat as simply axiomatic the proposition that

- if a question will *ultimately* be one for judicial determination, then
- it may *immediately* be one for judicial determination.[7]

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[6] The Supreme Court regularly uses the term when it poses questions *framed as in # (2) above*; see the cases in note 3 supra. See also Andrea K. Bjorklund, Case *Comment, Republic of Argentina v. BG Group PLC,* 27 ICSID Rev. 4, 5 (2012): In discussing the *Republic of Argentina* case---in which the D.C. Circuit ordered that a BIT award be vacated because "a precondition to arbitration of an investor's claim" had not been satisfied---Professor Bjorklund suggests that the terms in which the court's opinion is framed may be "confusing at the outset as it invoked the term 'gateway' even though Argentina did not seek intervention at the commencement of the arbitration": "Yet," she reminds us, "determining to whom parties have referred certain gateway questions has an effect on the back end of the arbitration, too."

[7] That is to say, our assumption has been that a judicial determination with respect to the duty to arbitrate is possible----not only on review after an award has been rendered---but also before any proceedings at all have commenced, by a motion to stay litigation or to compel arbitration under §§ 3 and 4 of the FAA. American legislation thus "allows an objecting party to seek judicial determination of the scope of consent either before, during, or after an arbitration," Grad v. Wetherhold Galleries, 550 A.2d 903, 908 (D.C. 1995)(Uniform Arbitration Act). In this country, then, "the doctrine of *compétence/compétence*--rather than the corollary of natural law that it is frequently assumed to be--takes on instead the air of a local solution with little or no relevance elsewhere," Alan Scott Rau, The Culture of American Arbitration and the Lessons of ADR, 40 Tex. Int'l L.J. 449, 462 (2005).

So I find quite puzzling the suggestion that recent Supreme Court jurisprudence "must be understood" as holding that if challenges are made *both* to the underlying contract and to the arbitration agreement -- challenges which might therefore impeach the arbitration agreement itself---- then such a challenge must "preliminarily" and "in the first instance" be resolved by the arbitrators, and only subsequently addressed by a court in a proceeding to vacate. *See* 1 GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 942-43, 958 (2009)(a result ironically "very similar" to the "*prima facie* standard applied in France and elsewhere"). However desirable as a normative matter, U.S. courts have never in fact done anything remotely like this; *see* Alan Scott Rau, *Separability in the United States Supreme Court*, 2006:1 Stockholm International Arbitration Review 1 (2006). Nor is it easy to grasp how any such notion of an "interim allocation" could possibly be thought consistent with the mandate of FAA § 4 that a court first actually be "satisfied" that an agreement to arbitrate not be "in issue." See also *Rau, "Trilogy",* at 492 fn. 197(where there is no "continuing contractual obligation on the part of one party that constrains him to submit to arbitration," then a court "has no business compelling arbitration under § 4").

All this is made quite explicit, if it were necessary to do so, in Bensadoun v. Jobe-Riat, 316 F.3d 171 (2nd Cir. 2003): Here arbitration had been initiated with the NASD, and the respondent/broker sought to enjoin it---on the ground that "none of the [claimants] was ever his customer." The district court refused relief, finding that the allegations by the putative customer were "sufficient, on the present sparse record, to support sending the matter to arbitration (without prejudice to any subsequent determination the arbitrators my make, on a fuller record, as to their jurisdiction)." The court of appeals inevitably reversed---reminding the lower court that before anything else happened, it was the court's duty to itself "render a final decision on [the broker's] claim that the investors had no right to arbitrate their claims against him." Material issues of fact---e.g., whether the broker intended to deceive the investors into believing they had accounts with him---remained, and had to be determined by a court "before a final decision on arbitrability is reached"; the arbitration was to be stayed pending resolution of these issues.

Such a view is hardly inevitable. It is, as we shall see in a moment, quite eminently defensible in prudential and instrumental terms. But it is flawed in eliding the cost/benefit analysis that other legal regimes---including the inevitably more sophisticated Gallic version—have the virtue of addressing somewhat more directly and explicitly. Perhaps this question of timing may, then, deserve a brief discussion before we turn to the main event.

II. The Question of Timing

Now it is well known that certain arbitration regimes choose to severely limit any possibility of judicial control over arbitral jurisdiction at any time before the proceedings are terminated by an award. The paradigm case is France---where a court, presented with the objection that a dispute before it is the subject of an agreement to arbitrate, must by statute refuse to proceed any further.[8] Once put into play, the logic of this system is not merely robust, but characteristically relentless: As has often been pointed out, even a claimant who does not believe that he is bound by an arbitration agreement has no alternative but to first institute an arbitral proceeding -- and participate in the selection of the tribunal -- all for the sole purpose of asking the arbitrators to declare that they may not hear the case.[9] In addition, it seems to follow ineluctably that a French court must consider itself barred from adjudicating a matter even where the courts of the agreed seat -- say, New York -- have already held the arbitration clause to be invalid under the *lex arbitri*.[10] (*Quaere* whether such a result

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Bensadoun arose in the context of a respondent's motion to enjoin a threatened arbitration. By contrast, with respect to a claimant's motion to compel arbitration under § 4, I readily concede that where the arbitration agreement allows him to proceed ex parte, the claimant's ability to obtain an initial judicial determination of the duty to arbitrate may in some courts be somewhat problematical. But holdings to the effect that such claimants are not truly "aggrieved" within the meaning of the Act are simply misguided. Cf. *Rau, "Jurisdiction,"* at 116 fn. 180.

[8] A court must in all cases declare itself to be without "jurisdiction" whenever a dispute subject to an arbitration agreement has already been submitted to an arbitral tribunal (that is, whenever the arbitral tribunal has been formed [*constitué]* and the tribunal is thus "seized" of the dispute [*saisi*]). And it must do precisely the same thing even where the dispute has *not yet* been brought before the arbitral tribunal---at least as long as the arbitration agreement is not "clearly void" [*manifestement nulle*] or "clearly inapplicable." Decree No. 2011-48 of Jan. 13, 2011, arts. 1448, 1456, 1506. None of this, of course, prevents a later judicial challenge, on the canonical grounds, after an award has been rendered, see id. arts. 1492 (domestic arbitration), 1520 (international arbitration subject to French arbitration law, whether because the seat is in France or otherwise): Hence the court exercises a "gateway" function as the term is used in the text at #2 (but not as it is used in #3) above.

[9] *E.g.*, Peter Schlosser, *The Competence of Arbitrators and of Courts*, 8 ARB. INT'L 189, 201, 204 (1992).

[10] *Cf.* Copropriété Maritime Jules Verne v. American Bureau of Shipping, 2006 REV. ARB. 945 (Cour de Cassation, June 7, 2006) (New York arbitration; held, French courts may not review the arbitration clause "in a substantive and in-depth manner, whatever the place or seat of the arbitral tribunal," until the time an award has been rendered); *compare* Legal Department du Ministère de la Justice de la République d'Irak v. Sociétés Fincantieri Cantieri Navali Italiani, 2007 REV. ARB. 87 (Cour d'Appel de Paris, 2006) (French arbitration; held, Italian court ruling to the effect that an arbitration clause was "inoperative" by virtue of a U.N. embargo "cannot be honored and enforced in France," since a state court "must decline jurisdiction

could possibly make any sense in cases where the courts of New York had not only refused to compel arbitration, but -- as is their right -- had gone further and also *enjoined the parties from continuing the arbitration there?*).[11]

Now it would surely be vulgarly reductionist to make too much of the fact -- generally understood but rarely acknowledged -- that the French regime just happens to be closely congruent with the self-interest of the arbitration community; the ability to conduct arbitral proceedings----even where no valid agreement to arbitrate can later be found---might in fact be viewed as a sort of guild protection, suitable for a net exporter of arbitration services. Jobs for the boys is thus certainly a happy side effect of this model. But it can't be the engine driving the machine -- can it?[12] A more benign view is that the choice among various procedural regimes comes down, at bottom, to nothing more than the usual prudential questions imposed by a cost/benefit analysis.[13] That is:

- Is it best---as we have tended to assume in the United States and England---that the question of arbitral jurisdiction be resolved with finality as soon as possible, thereby obviating an extended and costly procedure that might turn out in the end to have been simply pointless? After all,

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unless a summary examination justifies the conclusion that the arbitration clause was manifestly void or inapplicable"); *see also id.* at 90, 93 (note Sylvain Bollée; the purpose of Article 1458 of the CPC "is not so much to silence the French judge as to give the first word to the arbitrator," and this can only be accomplished if we make sure that motions to a court, "in any country whatever," cannot "serve to torpedo the priority that must be accorded the arbitrators").

In the case given in the text, French deference to a putative New York arbitral proceeding would presumably envisage that the arbitration go forward there. If any award is ultimately rendered, the courts in New York would inevitably go on to annul it---but of course, that fact too would be equally irrelevant in Paris.

[11] *Cf.* Dominique Hascher, Injunctions in Favor of and Against Arbitration, 21 Amer. Rev. of Int'l Arb. 189, 192 (2010)(where a lawsuit is brought on the underlying cause of action in France, "an American injunction against an arbitration situated in the U.S." would "not be effective because the [*American Bureau of Shipping* case, *supra* note 10] made it clear that [the French rule giving priority to the arbitrators] applies regardless of the seat of the arbitral tribunal").

[12] *Cf.* Symposium, *La clause compromissoire, in Perspectives d'évolution du droit francais de l'arbitrage*, 1992 REV. ARB. 285 (discussion; intervention of Pierre Bellet): "What interests us, is not the financial advantages that arbitration can have for arbitrators, but the advantages that the development of arbitration can have for France."

[13] An explicit and highly nuanced attempt to set out the cost/benefit considerations appears in BORN, supra n.7 at 971-81 (instead of trying to "adopt clear-cut legal categories," it would be better, in deciding whether interlocutory judicial consideration should be available, to instead accord "decisive weight . . . to a case-by –case assessment of questions of efficiency, fairness and institutional competence."). Such "case-by-case assessment" may evoke individualized efficiency and fairness concerns that are not internalized in either the French or U.S. models, see, e.g., id. at 979 ("How advanced is the arbitration?" Was the jurisdictional challenge made "at the 11th hour?" Are "foreign legal issues," as to which the arbitral tribunal may have greater competence, involved in the jurisdictional determination?)

- for the moving party, a judicial imprimatur along the lines of FAA § 4 will foreclose post-award assertions by the respondent that the arbitration was a nullity; and by the same token,

- early judicial resolution may relieve the *resisting* party of the need to put on any defense on the merits -- and eliminate the risk, if he chooses instead to stay out, that any such defense will be deemed waived.[14]

The force of these considerations is strongest where --- as is quite often the case --- the states most willing to entertain pre-arbitration motions to police abusive proceedings happen, at the same time, to be among those most willing to move the motion to the head of the queue, and to provide a summary method of disposition.[15]

- Or alternatively, might it perhaps be preferable---as French law provides--- to allow the arbitration to proceed, honoring the parties' original bargain to get in and out of arbitration in the most expeditious manner?

    - An extreme and inflexible rule of *compétence/compétence* may well reflect a suspicion (unverifiable, of course, but commonly an article of faith in the arbitration establishment) that "more often than not" a challenge to arbitral jurisdiction is frivolous -- nothing but a delaying and obstructive tactic by the recalcitrant party, who "is in bad faith and only trying to gain time."[16]

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[14] *See* Schlosser, *supra* note 9 at 193 (it is "deplorable" that parties must often "invest large amounts of money and time-consuming, cumbersome work in the arbitration before they are allowed in the forthcoming challenge or enforcement proceeding to seek the court's review as to the legality of the arbitration proceedings"). Cf. ADAM SAMUEL, JURISDICTIONAL PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION 189 (1989)(legislation in some states that only permits a court to make a binding ruling on jurisdiction where "there is no prima facie arbitral agreement applicable to the dispute" "seems to produce the worst of all possible solutions," as the challenge to arbitral jurisdiction may have to be "presented three times").

[15] *See* MICHAEL J. MUSTILL & STEWART C. BOYD, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND 782 (2nd ed. 1989) (if a party tells the arbitrator that "he is about to apply for declaratory relief," the arbitrator should "suspend the reference until the court has arrived at a decision"; if he feels that this will involve undue delay, "there is no reason why he should not say so, in which case the Court will no doubt take his remarks into account when fixing a date for the hearing of the declaratory action"); cf. Kelly v. Hinson, 387 S.W.3d 906 (Tex. App. 2012)(trial court erred "by failing to rule on [defendant's] motion to compel arbitration prior to granting summary judgment for [plaintiff]"; "a trial court should rule expeditiously on a motion to compel arbitration," and had "a ministerial duty to set [defendant's] motion for a hearing and to rule on it").

[16] *See, e.g.*, Antonias Dimolitsa, *Autonomie et* "Kompetenz-Kompetenz," 1998 REV. ARB. 305, 325; Emmanuel Gaillard, Note [to Soc. Coprodag v. Bohin (Cour de Cassation, May 10, 1995)], 1995 REV. ARB. 618, 620-21 (situations where the claim of a lack of arbitral jurisdiction is well-founded will be "statistically rare," and so the rule is necessary to discourage litigants from schemes aimed at "destabilizing" or disturbing the orderly conduct of an arbitration).

- This choice does after all permit -- indeed encourage -- the tribunal itself to render a preliminary award on the jurisdictional issue alone -- something it is likely to do in the normal course of events, and which can expedite matters by making the question ripe for immediate review.[17]

- Nor can one be blind to the fact that where (by contrast) the arbitration does proceed to a final award, in a good percentage of cases the party who has challenged arbitral jurisdiction will prevail anyway -- making the question entirely moot. (Where there is risk neutrality and a relatively equal access to information, this should in fact be true roughly half the time).[18] And in the last resort (that is, even where on

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[17] *See* FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 739 (Emmanuel Gaillard & John Savage eds., 1999) (an arbitral decision on jurisdiction "is a final decision on one aspect of the dispute" and "should therefore be considered as an award, against which an immediate action to set aside can be brought"); John J. Barceló, *Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, 36 VAND. J. TRANSNAT'L L. 1115, 1125-26 (2003) ("Thus, in the vast majority of cases, the arbitral process will go forward, but parties with a legitimate basis for objecting to the arbitrators' jurisdiction will have an opportunity, after only moderate delay, to make their case to a judge"). This will not be true of course where the arbitrator has refused to formalize his decision on jurisdiction before rendering a final award -- whether in the interest of prolonging his mandate, or in the interest of forestalling a challenge he deems abusive; *see* SAMUEL, *supra* note 14, at 212-24.

Immediate review should equally be available in cases – not exactly an everyday occurrence -- where the arbitrator has concluded that he *lacks* jurisdiction to resolve the dispute. It may be embarrassingly difficult to squeeze such a case into the architecture of the relevant statute; nevertheless as a practical matter most everyone readily recognizes the need for an immediate and definitive judicial declaration that the dispute is indeed "arbitrable." Doubtless the same arbitrator cannot be compelled to take up the task that he has already declined: *see* Sigvard Jarvin, Note [to Uzinexportimport Romanian Co. v. Attock Cement Co., Cour d'appel de Paris, July 7, 1994], 1995 REV. ARB. 115, 119 ("You can't make a bird sing"). Still, a substitute can always be named: and this time there must be no more provisional decisions, no *compétence/compétence*, no more shopping around; *basta. See generally* Jean-Baptiste Racine, *La sentence d'incompétence,* 2010 REV. ARB. 729, 740, 765 ("it is rational and logical" that if judicial review is possible when the arbitrators have held that they had jurisdiction, it should equally be the case when they have held that they didn't; "the symmetry is perfect"); see also id. at 775 (any new arbitrator "should deem the question of his jurisdiction to be settled and refuse to consider [*déclarer irrecevable*] any new challenge to it"). But cf. Vincent Chantebout, Note [to Soc. Papillon Group Corp. v. République Arabe de Syrie, Cour d'appel de Paris, March 9, 2009], 2010 REV. ARB. 525, 533 (a symmetrical treatment of these two questions "may nevertheless give rise to fears that judicial review has become the instrument of a forcible or coercive arbitration"; perhaps, given the "liberalism with which arbitrators usually tend to assess their own jurisdiction," the award should deemed a "threshold" that a court on review ---which ought not in this respect to be "more Catholic than the Pope" [*plus royaliste que le roi*]---should refrain from crossing).

[18] The seminal piece here is George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4-5, 19 (1984) ("where the gains or losses from litigation are equal to the parties, the individual maximizing decisions of the parties will create a strong bias toward a rate of success for plaintiffs at trial ... of 50 % regardless of the substantive standard of law"; "as the parties' error [in estimating the outcome] diminishes, the 50% proportion of victories will be approached more closely"). *See also* Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1965 (2009)

> review a "second look" at jurisdiction proves necessary), a national court should be able to learn something from an initial reasoned award -- perhaps from a tribunal with the comparative advantage of having been instructed in the facts, or possessing some particular insight into an applicable foreign law.[19]

Although the social interest in the reduction of systemic costs is critical, the result of any balancing process must be somewhat indeterminate.[20] For a long time my own reading of the French literature had made me intensely skeptical as to whether the game being played there could possibly be worth the candle: For I had always assumed that the statutory exception for clauses that were "manifestly" void would as a practical matter lead to the impossibility of cabining any preliminary inquiry -- thereby inevitably, fatally, muddling whatever practical benefits the doctrine seeks to attain.[21] In retrospect, however, that attitude may have reflected nothing more than the mentality of someone

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("the set of adjudged cases" is "a universe dominated by close cases," and these unsettled close cases will "fall more or less equally on either side" of the applicable decisional criterion).

[19] I am grateful to Gary Born for suggesting this point to me in a private communication. *See also* Azov Shipping Co v. Baltic Shipping Co (No.1), [1999] 1 Lloyd's Rep. 68 (QBD (Comm.)) ("I can quite see that there is an interest in encouraging parties to put their arguments on jurisdiction before the arbitrator himself," for "in many cases, and perhaps in the ordinary and normal case of such a challenge, where, for instance, there is simply an issue as to the width of an arbitration clause and no issue as to whether a party is bound to the relevant contract in the first place, the arbitrator's view may be accepted").

[20] Throughout the litigation in *First Options*, it was taken for granted that a court injunction against arbitration would always be available to any party who resists the initiation of an arbitration to which he claims he was not bound. The respondent, however, had chosen not to do this, but instead to argue *to the arbitrators* that they had no jurisdiction -- and the claimant asserted that if he were permitted to do that---"without being bound by the result"---this would encourage "delay and waste in the resolution of disputes." Justice Breyer, however, found this point "inconclusive" -- "for factual circumstances vary too greatly to permit a confident conclusion about whether allowing the arbitrator to make an initial (but independently reviewable) arbitrability determination would, in general, slow down the dispute resolution process." *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 946-47 (1995).

[21] It should not be surprising in the least that the statutory standard could not be cabined solely as an inquiry into whether a clause is "manifestly *nulle*" but would shade readily into the related inquiry as to whether it is "manifestly *inapplicable*" -- thereby posing not only the issues of existence and formation, but also those going to the scope of the clause, whether the clause still exists, whether a third party can be bound by or take advantage of the clause, and so forth and so on. *See* Decree No. 2011-48 of Jan. 13, 2011, art. 1448; Francois-Xavier Train, Note [to Soc. Champion supermarche France (CSF) v. Soc. Recape (Cour de Cassation, July 4, 2006)], 2006 REV. ARB. 961 ("if he limited himself solely to the manifest 'invalidity' of the clause, a judge could catch only a tiny fraction of all the cases where the clause is inoperative"; for example, when a clause linking a bankrupt debtor to his franchisor is asserted against a trustee acting in the collective interest of creditors, its inapplicability is "obvious").

Nor does it seem likely that one can really demarcate with any exactitude the precise line between what is -- on the one hand -- supposed to be a perfunctory examination, intended merely to allow the arbitration to proceed, and -- on the other -- an in-depth scrutiny; *see* SAMUEL, supra n.15 at 191 ("It is difficult to know how void an arbitral clause must be to be '*manifestement nulle*'"); Ibrahim Fadlallah, *Priorité a l'arbitrage: entre quelles parties?*, LES CAHIERS DE L'ARBITRAGE ¶13 (Gaz. Pal. 2002/1) (do judicial decisions dealing with the extension of arbitration clauses to third parties "simply represent the chronological priority due to provisional arbitral decisions, or do they resolve once and for all [*trancher dans le vif*] the very question of arbitral jurisdiction?").

trained in the common law: It honestly had not occurred to me that the French legislative scheme was designed to function instead as the subtlest of Cartesian traps: For not only is "voidness" or "inapplicability" impossible to demonstrate -- but *the more the resisting party tries to do* so, the more, apparently, he is demonstrating at the same time that whatever flaws there may be are not "*manifest*" -- -the more, that is, he's fatally caught up in the web, all his struggles telling against him.[22]

As this whole question of chronological priority is---or anyway, ought to be---exclusively responsive to prudential and instrumental concerns (with *a priori* claims of logic or ideology playing little role),[23] it is not surprising that infinite variations are

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[22] *See, e.g.*, Francois-Xavier Train, Note [to Soc. Laviosa Chimica Mineraria v. Soc. Afitex (Cour de Cassation, Feb. 11, 2009)], 2009 REV. ARB. 156, 157: When you think you are demonstrating that an arbitration clause is void, you are instead -- and necessarily -- proving "one thing and one thing only -- that it is not *manifestly* void, for what is 'manifest' has no need to be proven, only to be noticed [*constaté*]." (And as far as the judge is concerned, "even a willingness to look into the argument [*entrer en matière*] means that he has already stepped over the line").

[23] But cf. Emmanuel Gaillard, *La reconnaissance, en droit suisse, de la second moitié du principe d'effet négative de la compétence-compétence, in* GERALD AKSEN (ED.), GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER 311, 313-16 (2005): Arbitrators, as Professor Gaillard points out, are universally accorded the authority to rule on the validity and scope of the arbitration clause. [But of course all this means---*nothing more*---is that they are not thought to be somehow obligated to pack up their papers and turn out the lights, as soon as one of the putative parties sends them a note objecting to their jurisdiction]. If this is the case, argues Professor Gaillard, then such authority "is only real," can "only have any true impact," if pending their decision, state courts are required to "abstain from undertaking an in-depth inquiry into the same questions"; "general acceptance" of the first proposition "should logically lead" to this conclusion").

For the precisely opposite view---although, poignantly, one that is equally presented as an exercise in deductive reasoning--- *cf.* Stavros Brekoulakis, *The Negative Effect of Competence-Competence: The Verdict Has to be Negative*, 2009 AUSTRIAN ARB. Y.B. 238-258. This paper (whose title neatly summarizes its thesis) argues that to "confer *exclusive* jurisdiction on a forum whose validity is at stake, defies not only logic but also any principle of legitimacy," for parties "cannot" be obliged "to exclusively submit to arbitration proceedings [merely] on the basis of *prima facie* evidence."

By contrast, I had always supposed that legal rules exist only to serve some instrumental function -- and thus that there can be no "logical" a priori "impossibilities." If there are deemed to be systemic advantages from making litigants jump through certain hoops before they are allowed to present their arguments before a state court, why, then, this seems perfectly legitimate as long as their ultimate "day in court" is not unduly burdened. One illustration: In many American jurisdictions, courts may not hear a case *at all* unless the parties first go through a non-binding ADR process -- usually mediation, but in many cases, a form of "court-annexed" or "non-binding" arbitration. Now in such cases, of course, there is no evidence of "consent" or "agreement," *prima facie* or otherwise, on the part of the litigants *at all* -- that is deemed quite irrelevant and the question is not even asked. But the preliminary hurdle is imposed as a condition to the court's willingness to hear the case, in the expectation that this will increase the chances of settlement and thus reduce the judicial workload; if the arbitrators' decision is unacceptable to either party, then the court will hear the case *de novo. See generally* ALAN SCOTT RAU et al, PROCESSES OF DISPUTE RESOLUTION 534-43, 571-86 (4th ed. 2006); *cf. id.* at 649-50 (required "medical review panels" in malpractice cases). No more than with respect to the French model, a sustained argument here may not plausibly invoke lack of "due process" or "legitimacy."

available. Legislative regulations[24] and proposals in the secondary literature[25] abound that draw the balance somewhat differently; sitting somewhere in the middle between

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[24] The European Convention on International Commercial Arbitration provides--at least where a party "has initiated arbitration proceedings before any resort is had to a court" – that a court's ruling on the arbitrator's jurisdiction shall be "stayed" until an award is rendered, *unless the court has "good and substantial reasons to the contrary" (*Art. VI(3)). This limitation seems to swim in the same current of thought as that which underlies the frequently-advanced notion of a "*prima facie* examination." *See* Gaillard, supra n.23 at 325 n.40 (2005). Similarly, with respect to Switzerland, see BORN, supra n.7 at 904-907.

A strong body of authority asserts that the UNCITRAL Model Law, too, should be read in this way -- that is, that Article 8(1) of the Law must also be construed as "calling for [only] *prima facie* [rather than immediate and plenary] control of arbitral jurisdiction," *see* Frédéric Bachand, *Does Article 8 of the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction?*, 22 ARB. INT'L 463, 473 (2006). To that effect, see Dell Computer Corp. v. Union des Consommateurs, [2007] SCC 34 (Sup. Ct. Can.) ¶¶ 77, 84-86 ("as a general rule" "a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator," and a court should depart from this "rule of systematic referral" only where the challenge is "based solely on a question of law" and only where it is "satisfied" that the challenge " will not unduly impair the conduct of the arbitration proceeding"; "the *prima facie* analysis test is gaining acceptance and has the support of many authors"). Despite *Dell Computer,* Gary Born reads the Canadian cases as "generally" applying a full judicial review standard where there has been a prior challenge to *the existence or validity* of an arbitration agreement---where there is a dispute as to "whether an arbitral tribunal can validity do anything at all"---and reserving a *prima facie* approach only for circumstances where the parties have at least committed themselves to arbitrate "*some category of disputes*" but where the *scope of the duty to arbitrate* is in question. See BORN, supra n.7 at 886-94. I am entirely agnostic as to the content of Canadian law, but I have suggested that a similar approach might help us in construing the parties' agreement where we are trying to discover how far arbitrators should be presumed to have the authority to determine---this time, with finality---their own jurisdiction; see *Rau, "Consent,"* at 95-102.

In any event I would assume that the notion of a "prima facie examination"---however summary in theory---must in practice require a considerably more searching inquiry into the facts underlying arbitral jurisdiction than does the absolute self-abnegation required of French courts: See Yves Strickler, *La jurisprudence de la Cour de cassation en matière d'effet négative de la compétence-compétence,* [2011] REV. ARB. 192, 198 (French law imposes restrictions that go "well beyond" those implied by a "prima facie" examination" and asks instead whether the requisite "nullity" or "inapplicability" of the agreement to arbitrate is "blindingly obvious") (*creve les yeux*); *but cf.* 1 BORN, supra n.7 at 906 fn.276.

[25] Professor Bermann, for example, has suggested that it is "only prior to the start of the arbitration"---that is, only before "the moment when the arbitral tribunal is fully constituted"---that a party resisting arbitration should "be permitted to bring a gateway issue to court." See Bermann, supra n. 4 at 9 (although "United States law does not do that"). In thus leaving at least some scope for a judicial role, this proposal seems to track the structure of the European Convention. Both solutions share the virtue of sparing a reluctant claimant the need to participate in setting up a tribunal solely for the purpose of challenging its jurisdiction--- the rather curious result of the French regime. In addition, where a tribunal *has* in fact been named, a court that has later been seized with the merits could readily justify staying its hand, in reliance perhaps

- on the fact that some vetting function has already been exercised by an administering institution [The ICC, for example, will be willing to order that an "arbitration shall proceed" only "if and to the extent [that the ICC Court] "is prima facie satisfied" that an arbitration agreement "may exist," R.6(4)];
- or alternatively, on a similar vetting function that may have been exercised by some competent (even if complaisant, or officious) court which has presumed to name an arbitrator. There is even some mild American authority to the effect that a court's decision to do this---as opposed to granting a motion to compel---should be governed by "a somewhat less stringent standard"----so

the rather extreme French and American models, they may restrict potentially intrusive judicial intervention to a greater extent than the latter, while contemplating progressively greater roles for the courts at the outset than the former.

There remains, however, a far more fundamental point: Any "rule" can only derive meaning and legitimacy from the context in which it operates. For example: Although lofty and grandiloquent claims are often advanced for the French model as the embodiment of universal principles, [26] in reality the French structure of judicial enforcement and supervision of awards is harnessed to certain contingent preferences with respect to the organization of that state's judiciary. In particular, it rests on a preference that the functions of "review" and "enforcement" of arbitral awards be concentrated in the courts of appeal -- primarily, as a practical matter, the Cour d'appel de Paris. This "centralizing spirit" of French law reflects its characteristic striving for "Coherence" and "Rationality";[27] in particular, to allocate exclusive jurisdiction to the courts of appeal is thought essential to avoid any "unhealthy competition" with other

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that a court is not required to make a final determination with respect to the actual "existence" or "validity" of an arbitration agreement "before proceeding with the appointment of an arbitrator," ACEquip Ltd. v. American Engineering Corp., 315, F.3d 151, 156-57 (2nd Cir. 2003)(after all, if a court merely appoints an arbitrator, the " opposing party need not participate in arbitration" and would thus "retain the right to challenge the validity of the contract or its arbitration clause after the arbitration is complete"). Cf. *Rau, "Consent"* at 128 fn.177 ("this is hard to take very seriously"; "the requisite intention to arbitrate" should be the predicate in all cases).

- But by contrast: Suppose the applicable law or putative agreement permits one party to act unilaterally (should his opponent prove recalcitrant) in "constituting" an arbitral tribunal all by himself; see, e.g., Certain Underwriters at Lloyd's London v. Argonaut Ins. Co., 500 F.3d 571 (7th Cir. 2007)("if either party refuses or neglects to appoint an arbitrator . . . the requesting party may nominate two arbitrators, who shall choose the third"); General Motors Corp. v. Pamela Equities Corp., 146 f.3D 242 (5th Cir. 1998)(if a party fails to appoint an arbitrator he "shall be bound by the determination of the arbitrator appointed by the party demanding arbitration"). If courts were obliged to treat his doing so as a conclusive bar to pre-arbitral judicial intervention, surely strong incentives indeed would be created for an unseemly race to the favored forum.

[26] See Emmanuel Gaillard, Aspects philosphiques du droit de l'arbitrage international 126-28 (2008). Cf. also Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration, in* COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION (ICCA Congress Series No. 3) 257, 300-301 (Pieter Sanders ed., 1987) ("the question may arise whether the so-called principle of *compétence-compétence* of the arbitrator has not become (notwithstanding a certain reluctance of some national systems, influenced by the Anglo-American tradition) a fundamental principle of transnational public policy, especially now that it has been recognized by various international instruments"); Matthias Scherer & Teresa Giovannini, *Anti-Arbitration and Anti-Suit Injunctions in International Arbitration*, 2005: 3 STOCKHOLM INT'L L. REV. 201, 205 ("most arbitration practitioners will undoubtedly share" the view that an injunction against an arbitration proceeding "would clearly violate the internationally recognized principle of *Kompetenz-Kompetenz*").

[27] *See* Emmanuel Gaillard, *L'effet négatif de la compétence-compétence, in* JACQUES HALDY ET AL., (EDS.), ÉTUDES DE PROCÉDURE ET D'ARBITRAGE EN L'HONNEUR DE JEAN-FRANÇOIS POUDRET 387, 400 (1999) ("*le génie centralisateur*"); Gaillard, *supra* note 16, at 620-21 ("a keystone of the recent reforms of French arbitration law ... has been to rationalize the means of challenging awards by unifying all litigation on the subject in the courts of appeal"); Gaillard, *supra* note 23, at 318 (evoking, in the case of both France and Switzerland, a concern for the "coherence" of the state's judicial structure).

judges who might otherwise be approached for purely tactical reasons -- litigants should hardly be free to approach "any judge whatever."[28]

The consequences of this preference reverberate throughout the entire legal regime.[29] It is of course a reasonable and even an enviable choice: It makes possible, for example, a bench of arbitration mavens, fully at home with the interrelated pieces of the system, mindful of what is necessary to further the interests of users, and committed to doing so. The plausible corollary of their profound familiarity with the needs of the system is that other magistrates must be barred from anything other than the most perfunctory glance at any arbitration question.

But that choice has not been ours. Where, for example, a district court has plenary power both to compel arbitration and to vacate awards, and---in the absence of any duty to arbitrate---to itself adjudicate the underlying cause of action, none of the learning developed to buttress the French system can have much purchase.

If we are to work within the premises of our own system---to write on the slate we've been handed---the first entry is *First Options.* The starting point laid down there by Justice Breyer calls for the trial judge first to find, and then construe, some agreement between the parties.[30] (As a matter of fact this is equally the end point.). An

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[28] Gaillard, *supra* note 23, at 318 ("chaos" would result if a party could file a case in any court which would have jurisdiction over the substantive dispute in the absence of an arbitration clause -- "or even worse, before any judge whatever [*un juge quelconque*]"). *See also* Sophie Crépin, *Le contrôle des sentences arbitrates par la cour d'appel de Paris depuis les réformes de 1980 et 1981*, 1991 REV. ARB. 521, 528 ("motivated at all times by the desire to clarify and simplify the mechanisms for challenging arbitral awards, the legislature decided to entrust all of the litigation on this subject to a single jurisdiction, the court of appeal").

[29] Here's one more example: It seems to be taken quite for granted under French law that the parties have no power to contract for review of arbitral "errors of law." *See, e.g.*, Laurence Franc, *Contractual Modification of Judicial Review of Arbitral Awards: The French Position*, 10 AM. REV. INT'L ARB. 215, 217-18 (1999) ("the grounds enumerated in the statute cannot be extended, nor reduced; they are exclusive," and "this exclusivity is based on the plain language of the French text"). Note, though, that "review" of awards in the usual fashion is under French *law restricted to the courts of appeal* -- while of course, by contrast, in the absence of any arbitration agreement at all, the merits of any contract claim would be heard in *the usual court of first instanc*e. Given this architecture -- which necessarily imposes the strictest of separations between, on the one hand, the work of "review" for arbitral error, and on the other, the work of retail adjudication -- conceptual purity in fitting cases into the appropriate pigeonholes is absolutely critical. But under the FAA, by contrast, "review" of arbitral awards is carried out *by the very same district courts* that would in the first instance proceed to adjudicate disputes where (or to the extent that) the parties had made them "non arbitrable" -- or that would, to the extent an award has been understood to be non-binding, proceed to adjudicate the entire case de novo. So "on this side of the Atlantic, it shouldn't matter very much what you call it -- nor how you pronounce it." *Cf.* Alan Scott Rau, *Fear of Freedom,* 17 Amer. Rev. Int'l Arb. 469*,* 477-78 (2006).

[30] This is likely to prove challenging, the search for the probable expectation of the parties invariably requiring liberal recourse to a default rule methodology . The Supreme Court's difficulties in dealing with this need to deploy default rules to construe arbitration agreements is the subject of *Rau, "Trilogy,"* at

understanding with respect to arbitral jurisdiction has the same force and effect---no more and no less---as any agreement with respect to the quality of delivered widgets: "So the question, 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that matter."* [31]

- In the absence of any understanding that such issues would be submitted to an arbitral tribunal, a court has no reason to stay its hand at all.[32] So, for example---as the author of *First Options* wrote when still a mere judge on the court of appeals---"to enjoin a party from arbitrating where an agreement to arbitrate is absent is the concomitant of the power to compel arbitration where it is present."[33]

- By contrast, in the *presence* of such an agreement, why, a court must honor it by deferring to the right of the arbitral tribunal to decide its jurisdiction---and must defer, absolutely without distinction, both *prospectively* on motions to stay or compel under §§ 3 and 4, and *after the fact* on motions to confirm or vacate under §§ 9 and 10.

There is thus not the slightest warrant to believe that there is anything, in the *First Options* framework, that mandates multiple stages of litigation, or that contemplates distinctions between judicial actions taken prior to or subsequent to an arbitration. I can

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436-87 ("silence" in Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 17578 (2010)). But this at least defines the judicial task. And it is the subject of the discussion that follows below.

[31] *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943 (1995).

"Primary" in this context cannot mean anything more than "overriding," "hierarchically superior," that is, "final." See generally *Rau, "Arbitrability,"* at 364 ("the question, after all . . . is just *whose decision* the parties were willing to submit to, and just *whose interpretation* they had bargained for")(italics in original).

I appreciate of course that as it reached the Court, *First Options* only directly posed the question of "*the standard of review* applied to an arbitrator's decision about arbitrability," 514 U.S. at 942. But the structure of the FAA, and above all cases like *Rent-A-Center,* strongly suggest that precisely the same analysis should govern proceedings over motions made prior to the arbitration. On the structure of the FAA, see n. 7 supra; see also Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2777 (2010)(employee opposed the employer's motion to stay litigation and to compel arbitration on the ground that the arbitration agreement was "unconscionable"; "an agreement to arbitrate threshold issues [or "a gateway issue"] concerning the arbitration agreement . . . is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other").

[32] "If . . . the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely independently." *First Options of Chicago, Inc.,* 514 U.S. at 943.

[33] Société Générale de Surveillance S.A. v. Raytheon European Management & Systems Co., 643 F.2d 863, 868 (1st Cir. 1981)(Breyer, J.)(injunction was sought and granted "under Massachusetts law," the court holding that while the FAA "applies to this dispute," an injunction would interfere with "neither the letter nor the spirit" of federal law."

identify no trace of this in our jurisprudence---no black swans at all.[34] As an illustration, consider the recent protracted litigation in the Second Circuit in *Telenor:*[35]

- As I have just noted, courts may well on occasion find it appropriate to enjoin an arbitration: Naturally they will be prone to do so when they are convinced that no consent to arbitration has ever been given---but they may also issue an injunction in order to *preserve an ultimate judicial determination*---that is, pending any adjudication by a competent court of the issue of the duty to arbitrate.[36]

- Now suppose that a court manifests some reluctance to issue an injunction in these circumstances: In the flurry of litigation preceding the final award, this is precisely what happened in *Telenor.* Do we take this to be a sign of some sort of deference to the arbitral tribunal, suggesting that the court sees its authority as dependent upon the stage of the proceedings---on whether the arbitral tribunal has acted? Hardly: Judicial reticence reflects nothing more than our familiar understanding with respect to preliminary injunctions---that whether to issue or to withhold relief is the result of a discretionary exercise in "weighing the equities"---and in this calculus there will figure (and, given the policy of our statute, will figure powerfully) an assessment of the likelihood of success on the merits.[37]

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[34] But cf. Bermann, supra n.4 at 38 (U.S. courts "sometimes" refer parties to arbitration "as long as the clause may plausibly be thought to cover the dispute"; when they thus "confine themselves to a mere screening function at the threshold, they require only a prima facie showing that the dispute falls within the scope of the arbitration clause" and "to this extent . . . do something not unlike what French courts do"); see also Thai-Lao Lignite v. Government of the Lao People's Democratic Republic, Petition for Rehearing *En Banc* at *8 (2nd Cir., July 27, 2012)("the purpose of arbitration . . . would be frustrated" if parties could "routinely seek a preliminary ruling on arbitral jurisdiction from a court" "prior to arbitral proceedings even getting underway").

There are indeed "countervailing considerations" with respect to the "scope of an agreement to arbitrate," see the discussion in Bermann, supra n.4 at 37-38; however, I believe---rather than leading to a conclusion that there should be a prima facie screening at "the threshold"---they lead to a conclusion that there should be-- *at any stage*---a merely perfunctory screening to identify some "clear and unmistakable" intention to entrust such matters to arbitrators for *a final determination*. Cf. n. 24 supra; see also text accompanying nn. 71-73 infra.

[35] Storm LLC v. Telenor Mobile Communications AS, 2006 WL 3735657 (S.D.N.Y.)(Lynch, J.); Telenor Mobile Communications AS v. Storm LLC, 524 F.Supp.2d 332 (S.D.N.Y. 2007)(Lynch, J.), aff'd, 584 F.3d 396 (2nd Cir. 2009).

[36] In the Matter of the Application of Lakah, 602 F. Supp. 2d 497, 499 (S.D.N.Y. 2009). (petitioners were either non-signatories to the applicable arbitration agreements or claimed not to have signed in their personal capacity; held, "respondents are enjoined from participating in any arbitration proceeding on the question of whether [petitioners] are bound by the arbitration agreements ... until I have determined" the issue); McLaughlin Gormley King Co. v. Terminix Int'l Co., L.P., 105 F.3d 1192 (8th Cir. 1997)(("the order the court issued here, briefly freezing the parties' dispute resolution activities until it determines arbitrability, is surely appropriate").

[37] See *Storm LLC*, supra n. 36, 2006 WL 3735657 at *3 (despite an interlocutory arbitral order in which the tribunal upheld its own jurisdiction, the respondent moved to enjoin the arbitration from continuing; the federal district court denied preliminary relief, "holding that the Court could not review an interlocutory order of an arbitral panel, and to the extent [respondent] relied on the general equitable power of the

- Or suppose---as also happened in *Telenor*---that a preliminary injunction is issued, "in aid of arbitration," to halt foreign litigation. This is nothing but the other side of the same coin, properly responsive to the same concerns: A court might be impelled to act, after weighing the likelihood of success and the risk of imminent and irreparable harm threatened by "vexatious" litigation---perhaps in the interest of preserving the efficacy of an ultimate arbitral proceeding, but more often---and more fundamentally---in the interest of protecting its own right to determine whether the arbitration should go forward. Far from being inconsistent with a court's immediate and plenary adjudication of a motion to stay or to compel, an injunction buttresses the court's ability to perform that task.[38]

- The later stages of the *Telenor* litigation played out in the context of competing motions to compel and to vacate the resulting award. The arbitral tribunal had issued a "Partial Award" affirming that it had jurisdiction over the dispute. After the final award was rendered, the court conducted an independent inquiry into whether the respondent had indeed "actually agreed to arbitrate the dispute": It refused, in other words, to defer to any jurisdictional determination on the part of the tribunal, and concluded that the dispute was indeed "arbitrable," the respondents' General Director having had actual authority to bind the respondent to the agreement. The fact that the UNCITRAL Rules had been incorporated into the parties' contract was deemed irrelevant to the court's duty to make a de novo determination. In language that could certainly have been

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Court, it was insufficiently likely to prevail on the merits, given the likely correctness of the arbitrators'' ruling"); see also id. at *7 fn. 3 ; see generally *Rau*, *"Jurisdiction,"* at 118 ("the standard for deciding to issue a preliminary injunction against an arbitration---in that respect quite unlike a decision on a stay under § 3, or a motion to compel under § 4 or § 206---will traditionally require at least some nod in the direction of 'balancing the equities,' and in particular some sort of finding as to the likelihood of the movant's success on the merits").

[38] See *Storm LLC*, supra n. 36, 2006 WL 3735657 at *9 ("The Ukrainian litigation seeks to 'sidestep' not merely the arbitration, but this Court's ruling" denying a preliminary injunction against the arbitration).

See also *Rau, "Jurisdiction,"* at 131 ("the remedy becomes routine to the extent the local courts have already taken steps in the exercise of their "supervisory" authority over the arbitration -- thus enabling them to make a claim to be protecting their own judgments"); SG Avipro Finance Ltd. v. Cameroon Airlines, 2005 WL 1353955 (S.D.N.Y. June 7, 2005) ("the enjoining forum's strong public policy in favor of arbitration . . . would be threatened if [respondent] were permitted to continue to pursue the Cameroon Action, particularly in light of the Court's decision herein granting [claimant's] motion to compel arbitration").

In *Telenor,* too, it appears that Judge Lynch might in fact have been able and willing simply to compel arbitration outright---and the only explanation for his reluctance to do so appears to have been his concern that such an order may not have been "procedurally appropriate where both parties have already submitted to arbitration," *Storm LLC*, supra n. 36, 2006 WL 3735657 at *8 (in any event any doubts with respect to the motion to compel had "nothing to do with the validity of the arbitration clause"). To similar effect, see LAIF X SPRL v. Axtel, S.A. de C.V., 390 F.3d 194 (2nd Cir. 2004)(district court's refusal to compel arbitration was reviewed de novo and affirmed---since here, too, both parties were already participating in the arbitration and so there had been no "refusal" to arbitrate).

tighter---surely it is best to avoid alien formulations whenever possible?[39]---Judge Lynch wrote:

> [The respondent's] concession that the Tribunal had jurisdiction to determine its own jurisdiction, under the doctrine of "competence-competence," which in turn is the basis for the UNCITRAL rules, did not restrict its ability to later request that this Court independently review the Tribunal's arbitrability decision. Instead, under the competence-competence doctrine, "the arbitrators' jurisdictional decision is subject to judicial review at any time before, after, or during arbitration proceedings."[40]

But note:

1. The fact that an arbitral tribunal is permitted to make a ruling with respect to its own jurisdiction (that it possesses, in other words, what is often called "positive *compétence-compétence")*---is, after all, about as anodyne a principle as one can imagine.[41] A "concession" to that effect should hardly have been necessary in the first place; a stipulation to that effect must in no way be confused with a distinct, and highly doubtful assertion---that the parties had adopted by contract the more absolute, Gallic, "negative" version of the doctrine. That would be a non sequitur---and would be, even if the parties could somehow be said to have the power, by contract, to bar a court from exercising its usual statutory and equitable authority.[42]

2. In consequence, the interest of *Telenor* lies not at all in anything relating to chronology or the timing of review---which is not really a subject of controversy or compelling interest on this side of the Atlantic.[43] The only question of

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[39] "At the end of the day nothing obligates us to find the European terminology particularly relevant to American procedure." *Rau, "Arbitrability,"* at 307 fn. 55.

[40] *Telenor Mobile Communications AS,* 524 F.Supp.2d at 351.

[41] See n. 23 supra*;* see also, e.g., Banus v. Citigroup Global Markets, Inc., 2010 WL 1643780 (S.D.N.Y.)(plaintiffs argued that "the arbitrators were guilty of misconduct in refusing an adjournment that would have permitted a determination by this Court as to whether this case may proceed as a class action " as permitted by FINRA rules; held, "the arbitrators did not exceed the capacious bounds of their discretion in denying the adjournment"; "the arbitrators were not required, particularly at that late hour, to adjourn it to allow" plaintiff to file a class action "in a transparent attempt to oust FINRA of its authority to proceed with the case").

[42] I guess I would concede that with a sufficient degree of explicitness and skilled drafting, the parties could make participation in an arbitral proceeding---stipulated to be in some degree "non binding"---a condition precedent to plenary adjudication. See n.23 supra. But I see no warrant in legislative history or common understanding for the proposition that this is what the UNCITRAL Rules were intended to accomplish.

[43] Cf. Petition for Rehearing *En Banc,* supra n.34 at **3, *5* ("All the courts that have used the competence-competence clause in rules of arbitral procedure . . . have done so only in the context of actions to compel arbitration" rather than in actions for post-award relief; the "key distinction" is between ""pre-arbitration actions, on the one hand," and "post-award actions, on the other"); see also n.34 supra.

I have been struck by the fact that whenever I (slyly) suggest to someone that his/her views amount to an attempt to slip French legislation into the architecture of our statute---merely because that seems normatively desirable---they stoutly (even indignantly) deny it. But any rule of chronological priority

interest in the case---or anywhere---lies in whether the parties, in their contract, have *assented to a grant to the arbitrators of final decision-making power*.[44] That, we remember, is the inquiry mandated by *First Options*---the issue of the allocation of authority. This, we remember, is the sense of the "gateway" metaphor I mentioned earlier---properly seeking to identify issues that are "logically prior prerequisites to arbitrable jurisdiction," or that "condition the ultimate validity of an award."[45]

By incorporating the UNCITRAL Rules (or other similar bodies of rules) in their contract, should the parties be taken to have expressed assent to arbitral determination of such issues? This is a fraught question. It was what *Telenor* was all about. And, as we shall see, the Second Circuit has faced it in a number of cases in recent years---and with uneven results. I turn to this below.

III. The Allocation of Decisionmaking Power

A recurring problem in any legal system is the need---in deciding whether to subject parties to binding arbitration---to mark off the respective roles of courts and arbitrators. When we come to this critical issue, concerns of efficiency---the cost/benefit engine that (as we have seen above) properly drives all discussions of chronological priority[46]---have little purchase.[47] They necessary recede into insignificance once we

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that would restrict judicial decisionmaking at any stage amounts precisely to a step in that direction, doesn't it?

[44] See PAULSSON, supra n. 5 (the fact that "*arbitrators may decide whether they have jurisdiction"* does not mean that courts themselves *cannot*---for that matter, it does not even "mean that *courts cannot consider the question until the arbitrator has disposed of it*"); cf. Alan Scott Rau, Arbitral Jurisdiction and the Dimensions of 'Consent," 24 ARB. INT'L 199, 219 (2008): "Despite the patent ambiguity of the word 'decide,' confusion of these two very different senses of the word [i.e,. the power to decide *at all* (including provisionally), and the power to decide *finally*] is common and fatal to intelligent argument."

Yet such incoherence persists: Like the poor, it is always with us. Cf. Jack M. Graves, Arbitration as Contract: The Need for a Fully Developed and Comprehensive Set of Statutory Default Legal Rules, 2 Wm. & Mary Bus. L. Rev. 227, 263 (2011)(although "the vast majority of modern arbitration laws grant arbitrators the authority to determine their own jurisdiction under the doctrine of competence-competence," the FAA "does not," but provides instead in § 4 "that the basic jurisdictional question of whether the parties agreed to arbitrate must be decided by the court"; although the Supreme Court has held that the "parties may contractually grant the arbitral tribunal the power to decide its own jurisdiction, such a contractual right is not equivalent to a statutory grant of competence-competence"---which is why the incorporation of the IACAC Rules in the Panama Convention "is quite significant" and something "quite unique in U.S. arbitration law"); cf. also id. at 276 ("in direct contrast" to the FAA, the UNCITRAL Model Law "grants the arbitrators the power to make [the] determination" as to whether the parties agreed to arbitration).

[45] See text accompanying nn. 5-6 supra.

[46] See text accompanying nn. 13-25 supra.

[47] Professor Bermann suggests that we can identify a "sharp contrast" between on the one hand "French law, which posits that arbitration's attractiveness depends on its real and reputed efficacy," and on the other, the "equilibrium" or "optimal balance" "that U.S. law pursues" between "efficiency and legitimacy," see Bermann, supra n.4 at 49' see also id. at 26 (the French and American approaches "part ways" in

recognize that---at whatever point this falls to be decided---our only task is to discover *what sort of process the parties have been willing to subject themselves to.* Some explicit indication would be nice---although in its inevitable absence, we are probably warranted in presuming that the parties would have wished to act in such a way as to reduce overall costs---thereby creating, and being able to redistribute, a joint surplus.[48] That is not a negligible insight---but here "efficiency" plays no greater role than as a handmaiden to, or as probative of, contractual intention.

It is, then, a commonplace that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[49] And it is equally a commonplace--- "follow[ing] inexorably from the first," "akin to a law of nature[50]---- that what is usually called this "question of arbitrability"[51] is "undeniably an issue for judicial determination."[52]

That was but a single step which begins a long journey: For surely it is possible to characterize *every* objection to arbitration as implicating the jurisdiction of the arbitrators---in the sense that it potentially calls into question the presence of consent to submit to the process?

- A party may well have "consented" to the arbitration of disputes relating to a contractual shipment of pork bellies--but he has not necessarily "consented"

"delineating between gateway and non-gateway issues," as under the former "all objections to the obligation to arbitrate are reserved . .. . for the arbitral tribunal itself"). This analysis requires us to revisit the quite distinct senses of the "gateway" metaphor that I tried to distinguish earlier; see text accompanying nn. 5-6 supra (distinguishing between (a) issues that are " a *logically prior* prerequisite to arbitral jurisdiction" and so (whenever raised) "*will condition the ultimate validity of an award,* and (b) issues that merely must be resolved "chronologically prior to arbitral proceedings" (whoever is to have the final word on the subject)). *It is only with respect to the latter---and so with no bearing on the legal currency of the ultimate award*---that it seems possible to articulate differing cost/benefit analyses that might well lead to divergent conclusions as to how the balance should be drawn.

[48] The Court in *Howsam* concluded that the parties were "likely to have thought that they had agreed that an arbitrator would" decide the critical question of compliance with the NASD's rules on "eligibility," see *Howsam,* supra n.3 at 83; see also text accompanying nn. 61-64 & n.62 infra. This rationale has been criticized for "purporting to read the minds of parties who assuredly had not been thinking about this matter at all," Jan Paulsson, *Jurisdiction and Admissibility, in* AKSEN, supra n.23 at 601, 615-17; see also Bermann, supra n.4 at 41 (for its conclusion the Court was "unable to summon anything more than intuition"). But again, choosing the proper default rule hardly requires us to "read the minds of parties"---it merely requires us to attribute to them---in the absence of evidence to the contrary, as a rough guess---a mere starting point---the intention to act efficiently in the interest of maximizing mutual gains.

[49] United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960); see also *Rau, "Separability,"* at 4-8 (("A person is only bound to arbitrate a dispute if he has agreed to do so").

[50] Cf. *Rau, "Arbitrability" at* 311.

[51] Alternative formulations---but to precisely the same effect---may ask,

- whether there is "a duty for the parties to arbitrate" the dispute, or
- "whether the parties have consented to a final arbitral judgment on the issues," or
- whether the arbitrators have been granted "jurisdiction" to decide the dispute.

[52] AT & T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 649 (1986).

thereby to arbitrate disputes arising out of an arguably distinct contract for the shipment of pig iron.[53]

- A party may undoubtedly have "consented" to arbitrate the merits of a contractual dispute---but it need not follow that he has "consented" to arbitrate the claim where, say, the validity of the contract itself has been vitiated by fraud.[54] Nor does it follow that he has necessarily "consented" to arbitrate any claim at all where the underlying contract is no longer in force---where it may have expired, or terminated, or been superseded or relinquished or repudiated or abandoned.

- A party may undoubtedly have "agreed" to arbitrate timely claims: But it does not at all follow that there was any "agreement" to arbitrate claims not brought within contractual time limits: If a contract provides that disputes are no longer "eligible" for arbitration after six years have elapsed, is it even possible to "speak of an 'arbitrator' at all in the seventh year"?[55]

- If A has agreed to arbitrate certain kinds of disputes with X, he has not necessarily "consented" to arbitrate with Y---even if the dispute with Y is closely intertwined with and rests on the same factual and legal matrix as the dispute with X.[56]

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[53] Cf. *Rau, "Separability*," at 110 ("an agreement's limitations on the scope of 'arbitrable' issues" have often been taken, " not as instructions to the arbitrators as to how they are to go about deciding the dispute, but as limits on their ability to entertain the case in the first place"); *Howsam,* supra n.3 at 83-84 (a "gateway question . . . of arbitrability" includes "a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy"(Breyer, J.).

[54] What is this but *Prima Paint?* See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967); *Rau, "Separability"* at 32 (courts resort to the slogan of 'separability' in order to treat an issue like 'fraud in the inducement' as just one more discrete controversy between the parties---that is, in precisely the same way as other issues going more conventionally to 'the merits'", and so benefiting from the same "presumption of arbitrability").

[55] William W. Park, Amending the Federal Arbitration Act, 13 Am. Rev. Int'l Arb. 75, 117 (2002). Typical of many older cases taking this line is Chicago School Reform Board of Trustees v. Diversified Pharmaceutical Services, Inc., 40 F.Supp.2d 987 (N.D. Ill. 1999) ("In no event may the arbitration be initiated more than one year after the date one party gave written notice of the dispute to the other party"; held, "time constraints on arbitration proceedings are substantive and jurisdictional rather than procedural"; neither party agreed to arbitrate claims more than one year old," and it would "violate" their "contractual rights to force them into arbitration"). These cases have of course been laid to rest by the Supreme Court in *Howsam*; see *Rau, "Separability,"* at 102 ("it seems infinitely more sensible to treat [contractual] time limits in a way that is consistent with functionally identical cases, in which similar assertions---that a claimant's delay or missteps have caused the dispute to be no longer 'arbitrable'---are made").

[56] See Alan Scott Rau and Edward F. Sherman, Tradition and Innovation in International Arbitration Procedure, 30 Tex. Int'l L.J. 89, 108-118 (1995) (consolidation); *Rau, "Trilogy,"* at 436-87 (classwide proceedings).

- Examples could probably be multiplied indefinitely: Could someone possibly have agreed to arbitrate a dispute that had already been the subject of a prior and binding judgment?[57] Or a prior and binding arbitration?[58]

In short, even an otherwise unexceptional arbitration agreement can be cabined about with limitations and conditions that may well be thought to go "to the power of the arbitrator to act." Say a photographer licenses reproduction rights in a photograph to a publisher, for use in a high school textbook with a print run "limited to 40,000 copies"---but the publisher has in fact reproduced over a million copies. Can the photographer now argue that the publisher has "assumed the legal status of a 'stranger,'" "identical to one who pirates wholesale the work of a copyright holder, never having had a contractual relationship with him in the first place"? Surely the photographer has never consented to arbitrate with a mere "stranger"?[59]

That last case---and indeed many of those that preceded it---might well appear to the informed reader as a *reductio ad absurdum*.[60] A *reductio* is usually a cheap

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[57] See *Rau, "Arbitrability*," at 341-42:

> Such a challenge might be characterized as a "defense to the "arbitrability" of the underlying claim. But given a sufficiently broad mandate to the arbitrator, a court is [equally] likely to find this also constitutes a separate, arbitrable issue: "Because issue preclusion can be arbitrated, it must be arbitrated." The court would then send the challenge to the arbitrators for a ruling on the res judicata or collateral estoppel effect of the prior adjudication; an arbitrator who declines to find preclusion has then presumably found that the underlying claim can itself be arbitrated.

[58] The claim that *a prior arbitration* can deprive subsequent arbitrators of their "jurisdiction" must seem particularly frivolous. But---as every realtor can tell you---there is at least *one buyer somewhere* for even the most shabby and ramshackle structure, especially in the Deep South; see, e.g., Bryan County v. Yates Paving & Grading Co., Inc., 638 S.E.2d 302 (Ga. 2006)(held, res judicata is not a claim "arising out of or relating to" the parties' contract within the language of a generic arbitration clause, since it is "a principle of law that does not arise out of the contract documents"; while it "eliminate[s] substantive claims," "it does not do so by reaching the merits of those claims"; as a consequence, if a claim is barred by res judicata "no arbitrable claims remain to be submitted to an arbitrator"; a court must after all "fulfill its gatekeeping role [sic] to determine whether any arbitrable claim has been presented").

[59] See Maisel v. McDougal Littell, 2006 WL 1409019 (S.D.N.Y.)(held, though, that plaintiff's argument---to the effect that the contractual limit of 40,000 copies "is a covenant and not a condition"--- is "plainly a question of the interpretation of the contract as regards the merits, and is for the arbitrator").

[60] A frequent problem with posing a *reductio ad absurdum* is that from time to time, the hypothetical unthinkable may in fact become reality. While sensible results are usually reached in time, this can often be a near-run thing. Consider the *Gueyffier* litigation in California: Here a franchise agreement provided that the "franchisor shall not, and can not be held in breach of this Agreement" unless he had received detailed written notice specifying the alleged breach, and unless he had failed to cure the breach within a reasonable period of time. [Note the "can not."]. However, finding that notice and an opportunity to cure would have been "idle"---and that the contract's requirements were therefore "moot"---the arbitrator rendered an award against the franchisor. This was vacated in the lower court on the ground that the arbirator had "exceeded his powers": The defect in the award was jurisdictional, for under the franchise agreement, the arbitrator simply "had no power" to alter the contractual provisions relating to notice and cure. Gueyffier v. Ann Summers Ltd., 50 Cal. Rptr. 3d 294 (Cal. App. 2006). Thankfully the California Supreme Court finally set things right---noting that these days, any limitation on actual arbitral authority has to be particularly explicit in order to give rise to vacatur; see 184 P.3d 739 (Cal. 2008)(arbitral power is usually presumed to include "the power to decide when particular clauses of the contract applied").

rhetorical device, but here at least it induces us to articulate a subtler point: To say that at some level of generality, all of these issues are somehow reserved "for the court," hardly means that a court must determine in every individual case whether the parties would have wanted the arbitrators to decide them. What courts have instead been about, over the years, is their familiar work of spinning out presumptions---most often in an honest attempt to prescribe majoritarian defaults aligned with "what rational parties would have agreed to;[61] occasionally by deploying "conscious interpretive strategies" in the service of some wider social policy.[62] The residue of this process is what we usually call "federal common law."[63] These presumptions can become so routine, so mechanical, so much a question of second nature to us, that we may not even notice the process we are going through---it is apparently easy enough for a casual observer to overlook the fact that we are talking about nothing more than the conscious choice of default rules rooted in probable intention.[64]

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[61] See *Rau, "Trilogy,"* at 463-64 ("the most common tactic is to adopt a 'mimicking' principle which seeks to align what the court does with a hypothetical consent---hence the phrase 'implied terms'; "the search is for those terms the 'parties would have agreed upon' in a completely spelled-out agreement---or perhaps, for the bargain that most similarly situated parties would have chosen, or that it would be rational for such parties to have chosen *ex ante*").

[62] For example, the time-honored "presumption of arbitrability" is probably best viewed as a majoritarian default that was likely to have been desired by both parties *ex ante*, see n.47 supra; at the same time, though, it might be thought to reflect a federal policy preference in favor of directing disputed issues to alternative fora; see *Rau, "Trilogy*," at 466 fn. 114.

For other examples, see Alan Scott Rau, The UNCITRAL Model Law in State and Federal Courts: The Case of "Waiver," 6 Amer. Rev. of Int'l Arb. 223, 256 (1995)("choosing [in the *Mastrobuono* case] to construe [a] choice-of-law clause as inapplicable to state restrictions on arbitral power was a means of furthering the time-honored 'federal policy favoring arbitration'"; it was "also responsive to those consumer protection concerns behind the 'common-law rule of contract interpretation' that ambiguous language should be construed against the drafter"); *Rau, "Arbitrability*" at 300 (Justice Breyer's account in *First Options* of "what might otherwise be thought equivocal behavior" on the part of the respondent was adopted "precisely in order to relieve [respondents who are contesting a duty to arbitrate] from being forced to select from the usual menu of wholly unpalatable choices").

Finally, see *Howsam,* supra n.3 at 85 ("it is reasonable to infer that the parties intended the agreement to reflect" the understanding that NASD arbitrators are "comparatively better able to interpret and to apply" their rules; in addition, "for the law to assume an expectation that aligns (1) decisionmaker with (2) comparative expertise will help better to secure a fair and expeditious resolution of the underlying controversy").

[63] "Default rules pervade so much of our law of arbitration." See *Rau, "Trilogy*," at 481-82 fn. 168 (pointing to multiple examples).

[64] See, e.g., Rau & Sherman, supra n.55 at 113 (consolidation of related proceedings; "a blithe assertion that 'if it had been the parties' intention to submit their disputes to a multiparty arbitration setting, they would have so provided in their contracts' is nothing more than an extravagant form of question-begging"); but see Note, *Compulsory Consolidation of International Arbitral Proceedings: Effects on Pacta Sunt Servanda and the General Arbitration Process*, 2 TULANE J. INT'L & COMP. L. 223, 251 (1994) ("If the parties to a multi-party dispute have not explicitly agreed to submit their disputes to a consolidated tribunal, then they have chosen to submit their disputes to separate arbitral tribunals .... Under the doctrine of pacta *sunt servanda*, the parties are only bound by what is in the contract").

The paradigm case, though, is presented by the presumption of "separability". See *Rau, "Separability,"* at 37 ("to courts, attorneys, and academics alike, *Prima Paint* does not really seem to be just a 'presumption'---still less does it seem to be an individualized factual inquiry---it rather has the feel of

In an earlier article I spelled out at some length some of the implications of this analysis:[65] The critical question of "consent to arbitration," I argued, is in all cases a matter of degree---an infinite series of points on a continuum. The presence of "consent" might be tested, to change the metaphor, "in terms of a series of concentric circles, radiating outward."

So in the core, inner circle, one has to ask, "did the parties agree to arbitrate *anything at all, at any time*?" Here, insistence on evidence of the parties' consent to a final arbitral determination must be rigorous indeed.[66] After that hurdle is crossed---

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a 'doctrine,' a 'rule of law'"). For example, see Stephen J. Ware, Arbitration Law's Separability Doctine After *Buckeye Check Cashing, Inc. v. Cardegna,* 8 Nev. L.J. 107, 123 fn. 107 (2007). Professor Ware writes here that the

> separability doctrine cannot be defended on the ground that it is a "default rule" . . . Rules about what constitutes an enforceable contract cannot be default rules because they are logically prior to the concept of a 'default rule.' . . . . Why should an *unenforceable* contract be sufficient to contract around the default rule that disputes are litigated rather than arbitrated, when the law ordinarily requires an *enforceable* contract to contract around other default rules?

The problem with all this, of course, is that *Prima Paint* does not in the least purport to tell us "what constitutes an enforceable contract"; it is rather an "inquiry---to be resolved by the terms of the contract, context, and policy---into *what was the forum preferred by the parties to make this definitive determination of validity*." *Rau, "Separability,"* at 34 fn. 82. Professor Ware poignantly concedes that if the parties "form two contracts a year apart," then an arbitration clause in the first might possibly apply to a claim of fraudulent inducement with respect to the second. Ware, supra at 123 fn. 107. But he does not seem to perceive that his intuition about what must amount to "truly separate contracts," (id.) is simple *ipse dixit*-ism---and that any assumption to the effect that some undefined lapse of time---or perhaps some physical separation of the paperwork---must be decisive, is nothing but formalism: "It is just as facile to assume *a priori* that defects in the main agreement *must* vitiate the arbitration clause, as to assume that they *cannot." Rau, "Separability,"* at 27.

Again: Consider the problem posed by *Howsam,* see nn. 3, 61 supra. The Court settled there on a sensible default rule allocating to the arbitrators the authority to interpret the NASD rules with respect to "eligibility," see n.48 supra. The hapless drafters of the Revised Uniform Arbitration Act came up instead with a statutory provision to the effect that while

- "the court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate," by contrast,
- "an arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled."

UNIF. ARB. ACT § 6 (amended 2000). Now I assume the drafters would have thought that the problem in *Howsam* itself was that of an arbitrable "condition precedent"---although I can't understand why it could not as readily be characterized as posing the question whether the "controversy is [still] subject to an agreement to arbitrate." On the other hand, some "condition precedent" challenges are unquestionably reserved for judicial determination, see Alan Scott Rau, Federal Common Law and Arbitral Power, 8 Nev. L.J. 169, 172-74 (2007); U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., ltd., 241 F.3d 135,149 (shipowner argued that a putative charter party "did not come into force due to the alleged failure on the part of [the charterer's] board of directors to approve the charter party," which was a "condition" to the charter; the court found that "the weight of the evidence demonstrated that [the charterer's] board did approve the charter party within the agreed time period"). But no matter: While the UAA drafters appear to have been mesmerized by the obsolete taxonomy of 19th century contract lore, all of that is perfectly useless here. See Rau, supra at 170 ("codifying conceptualism").

[65] *Rau, "Consent,"* at 74-75.

[66] See also PAULSSON, supra n. 5 (here "denial of judicial reviewability is practically hopeless; there cannot be evidence of what the parties 'intended' by their agreement when it is said that they have

once we are satisfied that arbitrators have been selected and entrusted with the power to do *something*---the relevant inquiry changes; it seems rather extreme to treat a putative arbitrator "entirely as an intermeddling officious stranger,"[67] and the proper question becomes instead, "just how far were the parties willing to go in entrusting their affairs to 'their' arbitrators"---that is, just what was "*the precise scope of the submission*"? "And as we move from the core to the periphery, absolutism with respect to 'consent' may well be tempered"; insistence on anything other than a rough-and-ready requirement of "consent"---and thus insistence on the presumption of a judicial determination---become progressively less appropriate. The only question, then, becomes, "just what, in particular, are we to make of your undoubted, broad, generic, sweeping commitment to arbitrate disputes?"

And if we venture out further---into the outer limits of the solar system--- the question becomes easier still: Take, for example, a challenge to arbitral "jurisdiction" grounded in the assertion that contractual or statutory time limits for initiating an arbitration

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agreed to nothing"). On this principle challenges to a duty to arbitrate which call into question, *not only* the arbitration clause itself, but *equally and also the rest of the contract as well*, are necessarily for the court.

The error of assuming that *Prima Paint* somehow mandates the contrary is manifest; see *Rau,"Separability,"* at 14-18 ("not remotely contestable"). But it is apparently uneradicable; cf. Neal R. Troum, Policy Preferences and Enumerated Powers under the Federal Arbitration Act, 35 Amer. J. of Trial Advocacy 263, 291 (2011)(application of *Prima Paint* "to the facts of *First Options* (claim of no signature on the contract) leads to a result in which the arbitrator gets to decide arbitrability. This is so because the Kaplan's challenge . . . was a challenge to the enforceability of the contract as a whole and not to the arbitration provision"); see also id. at 282-83 ("a claim by a party that it never signed the contract containing the arbitration clause" "is one in which the threshold arbitrability question and the merits question are identical," and in such circumstances "the arbitrator must make the threshold . .. call").

I despair; I really do. Here's a daring proposal: What if---in order to curb (Johnson's phrase) the "epidemical conspiracy for the destruction of paper" that masquerades as "legal scholarship"---we expected "authors" not merely to cite, but actually to master and grapple with, the relevant literature?

Within the gravitational field of this principle are the cases where the objecting party has in some sense agreed to "arbitration" in the abstract, but has not necessarily agreed to be bound by a decision of *the particular tribunal* that the proponent is seeking to invoke; e.g., PAULSSON, supra (if the parties "agree to arbitration under the ABC Rules in city X to be conducted by arbitrator Y---and Y dies"); see also *Rau, "Consent,"* at 140 ("putative 'arbitrators' can have no power whatever to determine whether the parties wanted to submit to decision-makers chosen from the roster of the AAA, or alternatively, from the roster of the NASD"); cf. *Certain Underwriters at Lloyd's London*, supra n. 25 (agreement required that each party select an arbitrator within 30 days after notice; the court determined whether one party's arbitrator was named in a timely manner; since the observance of the time limit goes to the "composition of the tribunal" rather than the right to initiate a proceeding, the case is presumably not within *Howsam).*

[67] See *Rau, Consent,* at 95:

> Once they have agreed to arbitrate, the parties have an obvious incentive to monitor the behavior of arbitrators, minimizing the likelihood of a runaway tribunal, "outlier" awards, and unjustified assumptions of jurisdiction.

I also wrote there that "parties who have agreed to arbitration cannot after all rationally claim to be wholly astonished when they find 'their' arbitrators have been tempted to expand their own jurisdiction through self-interest---nor is it unfair to charge them with the risk that this might sometimes occur." This is perhaps one step too far---and to write something like this, I see now, could not have been more naïve; it is a remark that in the "real" world (that is, the world outside academia) has occasionally been thrown back in my face when sitting on a tribunal.

proceeding---or, what amounts to much the same thing, for asserting a claim---have not been observed. [68] Should such a challenge be successful, the inevitable result is that the claim will never be "heard at all"; it will not merely be barred in arbitration, but will be barred---finally disposed of---"in *whatever* forum it may be asserted, arbitral or judicial."[69] It seems straightforward enough, then, to conclude that this does not constitute a challenge to arbitration "in particular" at all,[70] and that the invocation of a time limit cannot be seen as calling into question a party's "consent" to arbitration---for the simple reason that the time limit is *just not relevant to the nature of the forum in which the claim will be heard*.[71]

Now we are all aware that it has been one of the great commonplaces of arbitration law to say that while disputes are readily presumed to be "arbitrable" where

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[68] See text accompanying n. 55 supra.

[69] See Paulsson, supra n.48 at 615-17 ("the purpose of the limitation was clearly to ensure that disputes would not linger").

Cf. *Rau, "Consent,"* at 135-38 (warning nevertheless that "such an easy route to a decision may not be available across the board," for example, with respect to arguments asserting "waiver of the right to arbitration"—for even these are arguments that are regularly left to arbitrators, even though the result of a successful challenge is that the party charged with "waiver" is not left without any remedy but is merely forced back into the courtroom).

[70] But cf. Bermann, supra n. 3 at 41 (with respect to "limitation periods," "strict application of separability would counsel a court to entertain that challenge as a threshold matter, since it is directed to the obligation to arbitrate in particular"; Professor Bermann nevertheless agrees that it would be proper to leave this to arbitrators in the interest of "balanc[ing] efficiency and legitimacy interests").

[71] See generally PAULSSON, supra n. 48 at 617 (in consequence the issue is "one of admissibility and the tribunal's decision is final"); *Rau, "Consent,"* at 137 fn. 206 (the precise terminology shouldn't matter, and it doesn't seem particularly important whether we say that in consequence (1) the claim was "unhearable," or instead (2) that, like a decision on "the merits," "it was legally hopeless"; "the proper result is the same either way"---the parties presumably having preferred that *any claim in any forum* be dismissed once it is found to be untimely, with a res judicata effect being triggered by an arbitral determination).

Cf. Great Western Mortgage Corp. v. Peacock, 110 F.3d 222, 232 (3rd Cir. 1997. Here the court held that an employee's challenge to an arbitration agreement "potentially depriv[ing]" her of the right to attorneys' fees and punitive damages must be submitted to the arbitrator, for "the availability of punitive damages is not relevant to the nature of the forum in which the complaint will be heard" and thus "cannot enter into a decision to compel arbitration"; it is "separate and apart from the issue of whether an employee has agreed to an arbitral forum"). See also Rau, "*Consent*," at 143-44 (any impermissible restriction of statutory rights "need not impair the validity of the submission to private adjudicators"; "if the process is not itself tainted, such defects say absolutely nothing about the unsuitability of the particular arbitral scheme"). Cf. Republic of Ecuador v. Occidental Exploration & Production Co., [2005] EWCA Civ. 1116 (C.A.) ¶ 9 (Ecuador argued, and tribunal agreed, that Occidental's claim for expropriation "was on any view 'inadmissible' (i.e. evidently unfounded)").

This distinction between [forum-specific] "jurisdictional" challenges, and [dispositive-with-res-judicata-effect] "admissibility" challenges, seems to be lost on Professor Wong, who then naturally concludes that *First Options* [an example of the former] and *Howsam* [an example of the latter] are incompatible. Jarrod Wong, Arbitrating in the Ether of Intent, http://ssrn.com/abstract=2200196 (forthcoming 2013), at p. 23 & fn. 66 (*Howsam* "significantly qualifies, if not reverses in part," *First Options*; in *Howsam* the Court "disagreed with . . . itself in *First Options*"). For the reasons given here, and at much greater length in the commentary cited here, they're not.

the "scope of the clause" is in question, by contrast, where the very existence of an agreement to arbitrate is challenged, no thumb is to be placed on the scales. This truism is hardly worth repeating---but then, after all, *that is not quite what I have been saying here.* The argument here is rather that this gradated view of "consent" is equally applicable to the *choice of the appropriate decisionmaker who will determine the discrete issue of arbitral jurisdiction.* Here too the claim is that once (or rather, to the extent) there has been shown some willingness to submit to private adjudication, the same comparative advantages---in interpretation of contract, practice of trade, and course of dealing---must come into play---as well as the same advantages of unitary adjudication that the parties should be understood to have preferred.[72] Not only a more tolerate attitude with respect to the requisite showing of "consent," but by the same token *a greater deference to the arbitrators' judgment on that very issue*, seem warranted.

Now I suppose there must persist at least an academic distinction between

- a judicial determination that an arbitration clause is "clear enough" to render the underlying matters in dispute "arbitrable,"[73] and

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[72] See *Rau, "Consent,"* at 95-102 ("What, Then, Are We Entitled to Presume?")(one preferred tactic is "to align presumed intent with 'comparative expertise'"---the approach of the Court in *Howsam*, see n.62 supra---while another move "is to presume intent on the basis of what will reduce overall costs, maximizing a joint surplus that the parties can in bargaining divide among themselves"; "it is not merely that what has been termed 'one-stop adjudication' is inevitably more economical, and thus likely to have been desired by both parties *ex ante*"; in addition, "questions of scope, and questions going conventionally 'to the merits,' are often so intertwined that we can expect similar arbitral competence to be relevant"). See also Fiona Trust & Holding Corp. v. Privalov, [2007] 1 All E.R. (Comm.) 891, 900 (C.A. 2007)(Longmore, L.J.):

> If business men go to the trouble of agreeing that their disputes be heard in the courts of a particular country or by a tribunal of their choice they do not expect … that time and expense will be taken in lengthy argument about … whether any particular cause of action comes within the meaning of the particular phrase they have chosen.

Cf. Steven Walt, Decision by Division: The Contractarian Structure of Commercial Arbitration, 51 Rutgers L. Rev. 369, 410 (1999) ("the marginal cost [of having an arbitrator determine] the scope of the arbitration clause is low," while "[a]llocating the determination to a court, another decision maker, requires an additional transaction and an extra cost").

[73] That is, that the parties had entrusted the merits to the arbitrator, who thus had "jurisdiction to resolve them." I have referred to this elsewhere as a "level 2" determination, and it is exemplified by *Prima Paint*. In *Prima Paint* it was simply assumed without discussion that the work of allocating decisionmaking authority between judicial and arbitral tribunals fell unchallenged *to the Court* "acting at the threshold as a gatekeeper"; the Court then held that a defense of fraudulent inducement should be adjudicated by the arbitrators (that is, in the American parlance, that a defense of fraudulent inducement was "arbitrable"). See *Rau, "Separability,"* at 93, 99. The court's allocative decision was conclusive and final---as was the arbitrators' decision, within their sphere of competence, on the issue whether rescission was warranted. To take another example, it would be a quite unexceptional application of the "presumption of arbitrability" to say that if a contract governing the sale of "fruit" contained an arbitration clause, that alone should be deemed to bring along with it the obligation to arbitrate future disputes over the sale of, say, pecans.

- a judicial determination that an arbitration clause is "clear enough" so that the *very question whether the underlying matters in dispute are subject to arbitration* is left for resolution by the arbitral tribunal.[74]

The former conclusively resolves the question of arbitral jurisdiction and is presumably binding on the arbitrators themselves;[75] the latter, by contrast, is a simple refusal to

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[74] That is, that the issue, whether "the merits were entrusted by the parties to the arbitrator for resolution," was *itself* a matter for the arbitral tribunal---with the corollary that its affirmative finding on jurisdiction would command the deference commonly extended to arbitral awards. This is what I have called a "level 3" determination, see id., and is exemplified by the celebrated "dictum" of *First Options* to the effect that a contract may delegate "the arbitrability question itself"---the question whether they had the power to decide---to the arbitrators. See also *Rau, "Arbitrability"* at 294-95 ("a dispute over whether I have validly agreed to *anything* is a dispute like any other, which parties can presumably resolve as they wish").

To revert to the example just used, here one might say that it could be a legitimate exercise in contract construction *for the arbitrators themselves to find* that the word "fruit" was used in "in the botanical sense," that is, to refer not only to apples and peaches but also to "the contents of any seed plan's developed ovary," including pecans. Cf. William W. Park, The Arbitrator's Jurisdiction to Determine Jurisdiction, 13 ICCA CONGRESS SERIES 55 (Kluwer Law International 2007). The only question, here as throughout, "is *just whose decision* the parties were willing to submit to, and just whose interpretation they had bargained, for," *Rau, "Consent,"* at 99. This is not of course to say that an arbitral determination assuming jurisdiction over the sale of, say, typewriters, would be immune from vacatur. Cf. William W. Park, The Arbitrability Dicta in *First Options v. Kaplan*: What Sort of *Kompetenz-Kompetenz* Has Crossed the Atlantic?, 12 ARB. INT'L 137, 145-46 (1996). The "critical distinction" then is between an "imperfect ability" to read a contract, "and a simple failure even to try," cf. Alan Scott Rau, Contracting out of the Arbitration Act, 8 Amer. Rev. of Int'l Arb. 225, 238 (1997).

Although this does not seem to have been generally recognized, the Court's *Pacificare* decision was also made at "level 3"; see Pacificare Health Systems, Inc. v. Book, 538 U.S. 401 (2003). Here the question posed was whether a contractual provision barring the award of punitive damages should be understood to bar the recovery of treble damages under RICO. Now it will rarely if ever be useful---or even coherent---to distinguish between (a) the assertion that the plaintiff "was not entitled to punitive damages," and (b) the assertion that "the arbitrators had no power to award punitive damages"; the contractual bar here could readily be framed either way. And indeed, of the four arbitration agreements at issue in *Pacificare*, two were in fact phrased in terms of "arbitral authority," and two were not. See *Rau, "Consent,"* at 142-43 ("at best these are variants in style and emphasis"); cf. Restatement of the Law, Third, The U.S. Law of International Commercial Arbitration § 4-14 *cmt. c*. (tent. draft no. 2, April 16, 2012)(such a provision will be "presumed" to be "a contractual limitation on remedies but not a specific restriction on the tribunal's authority"). In any event the Court---after provocatively noting the critical "fact that the parties' arbitration agreements may be construed to limit the arbitrators' authority to award" treble damages---concluded that a court should nevertheless not take upon itself "to decide the antecedent question of how the ambiguity is to be resolved." (The question whether a bar on RICO damages would render the arbitration agreement unenforceable as in violation of "public policy" was thus "premature.") The Court's more recent decision in *Rent-A-Center,* also written by Justice Scalia, equally raised "level 3" issues; see Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772 (2010)(arbitrators had been given the power to make "the arbitrability determination"---i.e., to resolve with finality any challenge to the arbitration clause on the ground of "unconscionability").

[75] See, e.g., Aircraft Braking Systems Corp. v. Local 856, Int'l Union, 97 F.3d 155 (6th Cir. 1996). Here the employer had sought a stay of arbitration on the ground that there was no agreement between the parties, but the court denied the motion, finding that "an interim agreement" existed that "included an agreement to arbitrate certain disputes." The arbitrator, though, ultimately held that the grievance was "not arbitrable" because "neither the Company nor the Union intended to be contractually bound." This

decide. But this is a distinction that has clearly been oversubtle for some---and so slippage, muddle, and lack of rigor are inevitable; decisions may even be found that somehow manage to deploy both in the course of a single opinion.[76]

And I suppose that to conflate the two must be in considerable tension with the conceptual purity of Justice Breyer's analytic scheme in *First Options*---it does rather seem that his intention there was to insist on a distinction between them.[77] But even so, we have moved on a bit since then: For the hallowed "presumption of arbitrability" has been so routinely compelling, and the process so perfunctory, that courts have naturally been led to collapse Justice Breyer's carefully-drawn categories: Why, after all, climb up the hill only to immediately march straight down again? The perfectly human desire to eschew unnecessary complexity is reinforced here by the general recognition that in almost every case, the purported "distinction" won't make the slightest bit of difference.[78]

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award was vacated as in "excess of authority": "Were we to adopt [the employer's] position, we would in effect be overruling a prior holding of this court."

[76] See e.g., Reliance Nat'l Ins. Co. v. Seismic Risk Ins. Services, Inc., 962 F. Supp. 385 (S.D.N.Y 1997); compare id.. at 389 ("the arbitrators should determine the arbitrability of the issues surrounding the Profit Commission Agreement") with id. at 390 ("disputes concerning profit commissions are encompassed within the ... arbitration clause" and so arbitration of the disputes should be compelled); WMA Securities, Inc. v. Ruppert, 80 F.Supp.2d 786 (S.D.Ohio 1999)(motion to enjoin arbitration denied; "while the issue of the existence of a valid agreement to arbitrate is properly resolved by the federal court, issues related to the scope of that agreement are not"; at the same time, the plaintiff's claims were found "related both to the business [of the defendant/securities dealer] and to the activities of its registered representatives" and therefore "are the proper subject of arbitration pursuant to NASD Rules").

[77] Justice Breyer's often-cited theoretical construct in *First Options* would seem to require that the usual judicial presumption in favor of arbitral jurisdiction is "reversed" when the question raised is not the lower-order question of "arbitrability," but instead the logically-prior and higher-order---but "arcane"---question of whether this issue of jurisdiction is to be decided by the courts themselves or left entirely to the arbitrators. See text accompanying nn. 98-100 infra; *Rau, "Arbitrability,"* at 307-16, 355-57.

[78] So when a clause is broadly drafted, and not particularly idiosyncratic, the judicial standard will as a practical matter be "so deferential that the scope issue is in effect assigned to arbitrators," see Walt, supra n. 72 at 375; see also id. at 430 (the doctrine that "courts determine the 'arbitrability of a dispute," and the doctrine that "all doubts about an arbitration clause are to be resolved in favor of coverage," taken together, "in combination, "effectively allocate the scope issue to the arbitrator").

See, e.g., JSC Surgutneftegas v. President and Fellows of Harvard College, 167 Fed. Appx. 266 (2nd Cir. 2006) ("the extremely broad terms of the Deposit Agreement's arbitration clause plainly evince an intent to have the question of arbitrability decided by an arbitrator"; however, "even were we to believe that it was for the district court to decide arbitrability, we would still reach the same result," as the plaintiff's claims "plainly relate to" the shares of preferred stock as to which the plaintiff was alleging a wrongful failure to pay dividends, and hence, are subject to arbitration); TC Arrowpoint, LP v. Choate Construction Co., 2006 WL 91767 (W.D.N.C) (defendant's conduct "in disputing only *whether"* the claim was arbitrable, "but not raising the further question of *who* would decide arbitrability," constitutes "clear and unmistakable evidence that the Defendant had agreed to arbitrate the issue of arbitrability"; however, "even assuming *arguendo* that the Court were to conduct an independent review of the question of arbitrability, clearly," given our '"healthy regard for the federal policy favoring arbitration," the defendant was bound to arbitrate).

So what have American courts tended to do when faced with a party's "undoubted, broad, generic, sweeping commitment to arbitrate disputes?" As we shall see, it is not in the least unusual these days to hold that such standard clauses amount to nothing less than a presumptive grant to arbitrators of the power to determine with some finality the scope of their own jurisdiction: This is what may happen, for example, when the parties have merely provided for the arbitration (a) of "any dispute, controversy or claim arising out of, or relating to, this agreement";[79] or (b) of "any disagreement or dispute … arising out of or in connection with the Agreement";[80] or even (c) when they have provided, in the most banal fashion, that "the arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code."[81]

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[79] E.g., Ryan, Beck & Co., LLC v. Fakih, 268 F. Supp. 2d 210 (E.D.N.Y. 2003) ("all disputes … arising out of or relating to [the investor's] Accounts … or any construction, performance, or breach of this or any other agreement between [the parties]"; language "is sufficiently plain and sweeping to encompass disputes over the scope of the arbitration clause, and to manifest the parties' intent to have the arbitrators decide that issue"); JSC Surgutneftegaz v. President and Fellows of Harvard College, 167 Fed. Appx. 266 (2d Cir. 2006) ("any controversy, claim or cause of action … arising out of or relating to" the agreement "or the breach hereof or thereof"; "the extremely broad terms of [the arbitration clause] plainly evince an intent to have the question of arbitrability decided by an arbitrator"); New Avex, Inc. v. Socata Aircraft Inc., 2002 WL 1998193 (S.D.N.Y.)(same; "the broadly worded, inclusive terms of the arbitration provision of the Agreement constitute unambiguous evidence that the parties clearly and unmistakably intended to arbitrate questions of arbitrability").

[80] E.g., Oriental Republic of Uruguay v. Chemical Overseas Holdings, Inc., 2006 WL 164967 (S.D.N.Y.) ("such broad language reflects the parties' intent to arbitrate all disputes relating to the Agreement—including whether the Arbitration Clause reaches a particular merits-related dispute"). *Cf*. Advanced Micro Devices, Inc. v. Intel Corp., 885 P.2d 994, 1000 (Cal. 1994) (contract provided for arbitration of "disagreements aris[ing] under this Agreement"; "our decisions teach that courts should generally defer to an arbitrator's finding that determination of a particular question is within the scope of his or her contractual authority").

[81] See the extremely suggestive case of Alliance Bernstein Investment Research & Management, Inc., v. Schaffran, 445 F.3d 121 (2nd Cir. 2006). Here the NASD Code provided that "a claim alleging employment discrimination . . . in violation of a statue is not required to be arbitrated." Did the plaintiff's claim that he had been fired because he was a "whistleblower," have to go to arbitration? Or should this be equated with a claim of "discrimination"? "The threshold question . . . is who decides arbitrability," and the court held that since "the crux of the dispute . . . concerns the interpretation and applicability of a provision of the Code," the parties had "unequivocally" agreed to submit that discrete dispute to arbitration. Not only had the parties agreed that the arbitrators would be "empowered" to interpret the rule, "they agreed further that any such determination would be final and binding."

See also Susai v. Jagadeesh, 2007 WL 1742870 (N.D. Cal.)("any and all disputes arising out of the terms of this Agreement, their interpretation, or any of the matters herein released"; held, "the parties effectively submitted *any* dispute between them to the arbitrator, including allegations of fraud in the inducement of agreement to the arbitration provisions"; "it is for the arbitrator, and not this Court, to determine the scope and validity of the release clause, and by incorporation, the scope and validity of the arbitration provision"); Silec Cable S.A.S. v. Alcoa Fjardaal, SF, 2012 WL 5906535 (W.D.Pa.)("any claim arising out of. . . the interpretation or performance of [the contract]"; "the plain meaning of the term 'interpretation' is 'the process to determine what something . . . means'" [citing Black's Law Dictionary], and "determining the meaning of "any claims arising out" of the agreement "necessarily includes the scope of the claims and whether they are arbitrable").

Who writes clauses that are much narrower than this? It is hard to imagine how the parties could have done much less.

And so, as we make our way across this continuum, what is interesting is not so much the abstract proposition that at some level "it is for the court" to vet arbitral jurisdiction, [82] as it is *the sharply restricted nature of the inquiry*: Where resolution of this question hinges on the interpretation ultimately given the contract clause, it is natural to treat it as *just one more discrete controversy between the parties*—and then usually sensible to assume that the parties---merely by settling upon the language of the conventional, expansive arbitration clause----were willing to submit such questions, *just as they entrusted every other interpretive question,* to their chosen arbitrators.[83] "No more is required to establish the arbitrability of the dispute";[84] no more is necessary to protect the role of the courts as the guardians of the temple---while reminding them to swear off the work of construction in favor of the designated readers of the parties' contract.[85] That anything more than this is misguided does not---even as one "trilogy" relentlessly succeeds another---seem to be generally appreciated.

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[82] *Howsam*, supra n.3, 537 U.S. at 84 ("a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy is for the court").

[83] The occasional assertion that such a contractual readjustment of the FAA's default allocation of authority between courts and arbitrators is somehow illegitimate -- that within the structure of the statute, the power to determine whether a duty to arbitrate exists remains a "nondelegable judicial function"---need not detain us. See *Rau, "Trilogy*," at 496-97 ("how much in thrall to the 'plain meaning' fallacy does one have to be, in order to deny that a court might be appropriately 'satisfied' [within the meaning of § 4] not directly, *but at an earlier stage and at one remove* -- that is, after it has identified an agreement by which the parties were willing to entrust this determination to their agent? Can any conceivable purpose explain such a wooden result?"). Cf. Immanuel Kant, The Conflict of the Faculties 65 (1798, Gregor trans. 1979)("if a scriptural text . . . contains statements that contradict practical reason, it must be interpreted in the interests of practical reason").

[84] Air Line Pilots Association, Int'l v. Midwest Express Airlines, Inc., 279 F.3d 553, 555 (7th Cir. 2002) (Posner, J.)(whether the "multiple opportunities" provision of a collective bargaining agreement superseded an earlier agreement with its "last chance language" is a matter of "interpretation of the agreement," and "no more is required to establish the arbitrability of the dispute"); *see also id.* at 556 ("when an arbitration clause is so broadly worded that it encompasses disputes over the scope or validity of the contract in which it is embedded, issues of the contract's scope or validity are for the arbitrators").

[85] I make no claim here to startling originality, for what I am saying does little more than track the proper reading of the seminal *AT&T* case, AT&T Technologies, Inc., v. Communications Workers of America 475 U.S. 643 (1986): From the complex interrelation of a number of contractual provisions, the lower courts concluded that if they were really required to resolve the "arbitrability" question, they would necessarily become "entangled" in the actual consideration of the merits. (For under the agreement, it seemed, the arbitrators would only have jurisdiction if it were first found that the right to fire workers was not unconditionally a "management function," and this---phrased otherwise, whether the right to terminate employees was unfettered or was in fact limited to cases where there was an actual "lack of work"---was the very issue in dispute). So the lower courts thought they had no other choice but to order "arbitration of the threshold issue of arbitrability"—for otherwise there would be nothing left for the arbitrator to decide.

A unanimous Supreme Court found this unacceptable: Any order to send "the arbitrability issue" itself to arbitration was necessarily improper---as it ignored the black letter principle that whether a arbitrate a particular dispute existed is "undeniably an issue for judicial determination" (unless of course the parties "clearly and unmistakably provide otherwise"!). But it is Justice Brennan's concurring opinion

IV. On the "Clear and Unmistakable": "This Is All One Big Overblown Latke."[86]

In one recent federal case an employee was assumed to have agreed that

> the Arbitrator shall have the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement, including but not limited to any claim that all or any part of this Agreement is void or voidable.[87]

The court granted the defendant's motion to compel---finding that this agreement "clearly and unmistakably provides an arbitrator with exclusive jurisdiction to decide issues of arbitrability." Its role, the court stressed, was strictly limited to "conducting a *facial and limited review* of the contract [to] "only [sic] decide whether the parties have in fact clearly and unmistakably agreed to commit" this question to arbitration.[88]

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that warrants far more attention---for he reminds us that in operation, this principle must have only the most marginal significance: For the question of "consent" is to be severed from the question of which party, union or employer, was in fact correct in its reading of the agreement; instead, the judicial role was "much simpler," "strictly confined" to the question "whether the parties agreed to submit *disputes over the meaning*" of the contract to arbitration, id. at 654; "we should interpret a collective-bargaining agreement only where there is some special reason to do so." Understandably, Justice Brennan thought this determination to be made by the lower courts on remand would be "straightforward and will require little time or effort." Id. at 655.

The court's task, in short, is no longer to discover whether the arbitrators "actually" had "jurisdiction" at all: It is, instead, far more cabined—the question is rather whether the agreement can be read so as to grant them this wider decisionmaking power, and then, perhaps, whether they have abused it. Another, more recent illustration is Huber, Hunt & Nichols, Inc. v. United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Industry, Local 38, 282 F.3d 746 (2002). Here a General Contractor entered into an overall project agreement with several unions; the agreement entrusted "non-jurisdictional" disputes to a project-wide "permanent arbitrator." This "permanent arbitrator" concluded that a work assignment dispute between the parties was a "jurisdictional dispute" [in this context, a "jurisdictional dispute" is one involving a single employer caught between conflicting union demands]—and he thus ordered the union to use the agreement's "jurisdictional dispute" resolution procedure, which required that the dispute be sent to the leadership of the adverse unions. His award was confirmed: "The text, structure and context" of the agreement "assign to [the arbitrator] the threshold determination whether or not a dispute is jurisdictional"; the proper inquiry for the court "is not whether the underlying dispute is arbitrable in and of itself; rather, we must [merely] ask whether the overall dispute, *which encompasses the disagreement over the nature of the underlying dispute*, is arbitrable." *Id*. at 749 (emphasis in original).

[86] "'This is all one big overblown latke,' Rabbi Levi Shemtov said of the fuss over the White House's Hanukkah party," "Washington Flap Over White House Hanukkah Party," New York Times, Dec. 11, 2009, at A23.

[87] Anderson v. Pitney Bowes, Inc., 2005 WL 1048700 (N.D. Cal.).

The court found that the employee's signature of a "Voluntary Agreement" containing an arbitration clause "objectively manifest[ed] his intent to agree to arbitrate." Id. at *3 fn.7. While the employee did claim that the "Agreement" was "unconscionable," the court stressed that he did not, by contrast, contend "*that the paragraph arguably giving the arbitrator the power to decide arbitrability"* was itself "unconscionable"---a critical distinction that foreshadowed the Supreme Court's later decision in Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772 (2011). See 2005 WL 1048700 at *2 fn.4.

[88] *Id.* at *4 (emphasis in original).

Now I'm not sure that I can make a great deal of sense of this last passage, either as a matter of psychology or of epistemology---nor even that I should try; if we are tasked with asking whether an expression is entirely free of ambiguity, it is not easy to grasp the notion of a restricted inquiry into the question that is itself prima facie and perfunctory. But no matter: The case at least confirms my impression that this whole subject has been trivialized. So let me at the outset suggest one small experiment: Can we try, in talking about this, simply to retire the shopworn notion of the "clear and unmistakable"---or at least to give it a well-deserved rest? And while we are at it, can we try to avoid all generalizations and abstractions of a similar nature---descending instead to the concrete, looking for what is actually at stake in the cases?[89] We can after all do justice to everything the Supreme Court has *done,* and (a nice bonus) to common sense, without being held captive to facile verbal formulations.

We begin, as we must, with *First Options*. Surely anyone trained in the law recognizes that *anything* contained in *any* judicial decision can only be understood in terms of the precise problem the court thought it was faced with---and in terms of the precise factual context in which the case arose? So everything starts here:

1. An arbitral tribunal had rendered an award against Mr. Kaplan, holding him jointly and severally liable with the company of which he was the President and sole shareholder. But had Mr. Kaplan ever consented to this exercise of arbitral authority? The only agreement that Kaplan had signed did not contain an arbitration clause: Had he ever personally submitted to the jurisdiction of the arbitrators? The Third Circuit held that he had not, and the Supreme Court affirmed.

- Whatever the claimant could point to in order to demonstrate consent—whether it was Kaplan's membership in the Philadelphia Stock Exchange, the fact that the agreements signed respectively by him and by his company were "inextricably tied together as part of one transaction," or some theory of piercing the corporate veil—all were held by the court to be without merit.[90]

- A logically prior question, though, was whether this was in fact even a matter for judicial determination: Had Kaplan perhaps "consented" at some higher conceptual level, by expressing his willingness to entrust the jurisdictional question itself to the arbitrators? Again, the holding was "no": For when he appeared before the tribunal, far from "waiving" or "surrendering" his defense, Kaplan had vigorously "asserted" and "reasserted" his objection to the tribunal's

[89] To particularize is the alone distinction of merit---general knowledges are those knowledges that idiots possess." William Blake, Annotations to Sir Joshua Reynolds' Discourses, *in* 2 Works of William Blake 323 (Edwin John Ellis & William Butler Yeats (eds.) 1893).

[90] See Kaplan v. First Options of Chicago, Inc., 19 F.3d 1503, 1513 (3rd Cir. 1994). This was an "independent" de novo finding that arbitral jurisdiction did not actually "exist." In the Supreme Court this question was held to be a "factbound issue" that was "beyond the scope of the questions we agreed to review." *First Options of Chicago, Inc.,* supra n.31, 514 U.S. at 949.

> taking jurisdiction over him personally. In those circumstances----since the respondent "cannot show that [Kaplan] clearly agreed to have the arbitrators decide (i.e., to arbitrate) the question of arbitrability"[91]---the tribunal's decision to assume jurisdiction was entitled to no deference whatever.

This is the precise holding in the Supreme Court: It is responsive to what I have called that "familiar, cruel dilemma," that "exquisite form of torture," faced by a respondent against whom an arbitration has been initiated, but who believes that he is not in fact subject to any arbitration agreement. Such a respondent "is often confronted with a menu of wholly unpalatable choices: Simply boycotting the proceedings would entail the loss of his right to contest the claim on the merits; on the other hand, appearing before the arbitrators to argue that he had never consented to arbitral jurisdiction" has in the past often led to a finding that he had "submitted" the issue to them.[92] In these circumstances an intention to leave to the arbitrators the question of the validity of his consent to arbitrate is sufficiently unusual, "sufficiently at odds with normal practice"[93] that we should presume against it: It is perhaps not impossible.[94] But it is damned unlikely.

At the very least it should be clear that consent cannot be constructed out of a simple argument to the tribunal; before Kaplan could be bound, the claimant would have to point to *something more than what he actually did. First Options*, then, then, is nothing more than an insistence on clear statement, a "conscious interpretive strategy" aimed at giving a fair "account of what might otherwise be thought equivocal behavior,"[95] one that at the same time allows a respondent to participate under protest while preserving a judicial forum for the determination of assent.

And that's all there is, really: While this, I think, is the proper domain of the "clear and unmistakable," it is after all a rum way of saying that *merely to show up and*

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[91] Id. at 946.

[92] See *Rau, "Arbitrability,"* at 296-300; *Rau, "Separability,"* at 97. See also Oral Argument in First Options of Chicago, Inc. v. Kaplan, March 22, 1995, 1995 WL 242250 at *22 (Justice Scalia)("that's just not fair, it really isn't").

[93] Cf. Virginia Carolina Tools, Inc. v. Int'l Tool Supply, Inc., 984 F.2d 113, 117 (4th Cir. 1993).

[94] See *Rau, "Arbitrability,"* at 295:

> [Suppose that] Mr. Kaplan has told the putative "arbitrators" that while he really does not believe that he is bound to arbitrate, he recognizes that this remains a complex legal question: So, in order to avoid duplicative and costly litigation---and after lengthy discussions with his counsel---he thinks it best to entrust this issue to the panel for a final judgment, being willing to abide whatever the award may be.

Compare Steven H. Reisberg, The Rules Governing Who Decides Jurisdictional Issues: *First Options v. Kaplan* Revisited, 20 Amer. Rev. of Int'l Arb. 159, 181 ("Where the question is whether there exists any binding arbitration agreement, there is no justification for asking whether this issue is one the parties agreed is to be submitted to arbitration. In fact, to attempt to do so is to ask for something that is logically impossible as it presumes its own premise").

[95] *Rau, "Trilogy,"* at 510.

complain is probative of precisely nothing.[96] "The work done by the "clear and unmistakable" trope in the dialectic of *First Options* is in simple opposition to any claim of "implied consent."[97]

2. Nevertheless there are aspects of the *First Options* decision that must give us pause. It is striking that from first to last Justice Breyer's discussion is repeatedly framed in terms of the notion of "arbitrability." ("Did the parties agree to submit the arbitrability question itself to arbitration?"). Use of this accordion term---a rough surrogate in American practice for "arbitral jurisdiction generally"---may lead us to believe that the scheme he is laying down for the allocation of authority between courts and arbitrators was intended to sweep quite broadly----to govern not only the question of whether someone like Mr. Kaplan is bound to arbitrate at all, but equally to govern the question whether a particular dispute is "within" (is "covered by") an agreed-to arbitration clause. This is now in fact pretty generally assumed[98]---although the slippage

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[96] For this reason it is error to assert that in *First Options, "*the Court held that a general and broad arbitration clause was not enough to satisfy the clear and unmistakable evidence requirement," Schneider v. Kingdom of Thailand, 10 Civ. 2729 (S.D.N.Y. March 14, 2010), at *10; to the same effect, see Richard C. Reuben, *First Options,* Consent to Arbitration, and the Demise of Separability:" Restoring Access to Justice for Contracts with Arbitration Provisions, 56 S.M.U. L. Rev. 819, 847 (2003)(*First Options* "was decided in the context of the Court's interpretation of a broad general arbitration provision," and "the Court declined to find First Options' broad arbitration clause sufficient to establish 'clear and unmistakable' intent to arbitrate the 'who decides' question"). See also Lawrence A. Cunningham, Rhetoric versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts, 75 Law & Contemp. Probs. 129 137-38 (2012)(*First Options* "departed from contract law" when it tested for "clear and unmistakable" intent by "concentrat[ing] not on the terms of the agreement, but on post-contractual conduct").

The flaws in all this should be clear enough: Surely the whole question---the only question--in *First Options* was whether Kaplan, by his conduct, had "submitted" himself to arbitral jurisdiction in the first place; the "terms" of the agreement ("broad" or otherwise) *to which he claimed to have been a complete stranger,* is strictly irrelevant until our uncertainty with respect to this first, core, question had been answered. And of course, it was ultimately answered in the negative.

[97] *Rau, "Trilogy,"* at 510. More recent decisions to precisely the same effect are Radiant Systems, Inc. v. American Scheduling, Inc., 2005 WL 2105953 (N.D. Tex.)("Radiant objected to its participation in the arbitration proceeding and filed an objection to the arbitrator's jurisdiction"; this "does not rise to the level of a clear and unmistakable willingness to arbitrate the issue"); Roe v. Ladymon, 318 S.W.3d 502 (Tex. App.2010)(Ladymon argued to the arbitral tribunal that he had signed the contract "solely as a partner in a registered limited liability partnership and thus had no personal liability"; the claimant's "argument that Ladymon waived his objection to the arbitrator's power over him by objecting to the arbitrator is, of course, circular").

[98] See *Howsam*, supra n.3, 537 U.S. at 84 (Breyer, J.)("a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide," and "[s]imilarly, a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy is for the court"); Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 452 (2003)(Breyer, J.)("matters of a kind that contracting parties would likely have expected a court to decide" "include" "whether a concededly binding arbitration clause applies to a certain type of controversy"); cf. *Rent-A-Center, West,* supra n.6, 130 S. Ct. at 2777 ("we have recognized that parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy"); First Team, Inc. v. Moto Photo, Inc., 1999 WL 58561 (N.D. Ill.)("if the arbitration agreement is silent or ambiguous on who decides arbitrability, we must

is discomforting, and all the resulting cackle with respect to "clear and unmistakable expression" has far outpaced, and put unnecessary pressure on, the fact pattern presented by *First Options* itself.

That the *First Options* analysis is intended to apply also to disputes over "scope" is certainly suggested by Justice Breyer's little riff on the "reversal of presumptions": Because the question of "who should decide arbitrability" is itself "rather arcane," he says, "the law" treats silence or ambiguity with respect to that issue "differently" from the way it treats silence or ambiguity with respect to the ultimate question----whether a particular dispute is truly "within the scope of a valid arbitration agreement." So the canonical presumption in favor of arbitration---well-established for the latter inquiry---is, for the former, "reversed."[99] But we note immediately that in any case where *the existence of a valid arbitration agreement* is challenged, such an agreement is never "presumed" anyway---there is of course no "presumption" at all in favor of a party's having given an initial consent to arbitrate *something*. And so in such cases there would be little sense---when it comes to the question of "who should decide"--- in consciously crafting a rule designed to be the precise mirror image of the usual default. There is only a "presumption to reverse" when what is at stake is the coverage of an admitted agreement.

But even so, whatever Justice Breyer says on this subject may still have very little purchase beyond the particular factual pattern faced by the Court. Certainly nothing more is compelled or necessarily implied.[100] Bear in mind that the only justification for requiring *any* "delegation" to the arbitral tribunal to be "clear and unmistakable" lies in the assistance it gives in construction: It is the appropriate heuristic for the question whether language or behavior---whatever the parties have said or done touching on the identity of the preferred decisionmaker ---should be read in a particular way.[101] Given

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construe it as excluding arbitrability from the scope of arbitrable issues"; "are defendant's claims within the scope of the parties' arbitration agreement? The arbitration panel found that they were. We do not, however, owe the panel's finding deference"). Cf. Reisberg, supra n. 94 at 176-77 ("a review of the Court's dicta" in *First Options* "reveals that the Court is now using the term 'arbitrability' to refer *only* to disputes about the scope of the arbitration agreement").

In the confusing period immediately following *First Options,* a number of courts were led to conclude otherwise, e.g., Consolidated Rail Corp. v. Metropolitan Transportation Authority, 1996 WL 137587 (S.D.N.Y.) at *8 ("*First Options* excludes scope arbitrability [sic] from the 'clear and unmistakable' standard---which encompasses formation issues only"); Dean Witter Reynolds, Inc. v. Iveson, 913 F. Supp. 47, 49-50 ("timeliness issues . . may be presented to the arbitrator and considered by him or her in determining the proper scope of arbitration"; Justice Breyer's decision in *First Options* could hardly be clearer on this point").

[99] *First Options of Chicago, Inc.,* supra n.31, 514 U.S. at 944-45.

[100] See *Rau, "Arbitrability,"* at 293: "Only in the most self-indulgent opinions are "dicta" non-functional arabesques, self-contained and decorative. With a judge of any intellectual power, it makes considerably more sense to treat his 'dicta' as integral to the structure of the narrative—as they are here."

[101] Cf. *General Motors Corp.,* supra n.25 at 250 (attorney's use of the terms "arbitrator," "respectfully submitted," and "formally requests" in correspondence with the putative arbitrator "may reasonably be interpreted to be expressions of courtesy and respect toward [him] as one potential member of a three-member arbitration panel," but "does not constitute clear and unmistakable evidence of [respondent's]

that background, we can concede that *First Options* does counsel reluctance to presume arbitral jurisdiction even with respect to the scope of consent---but still conclude that the reach of the principle does not extend much further than the holding, and the holding is simply this: that "ample skepticism is justified with respect to whether a tribunal may assume jurisdiction over *any* issue merely by virtue of the fact a party has argued the matter before it."

After all, Justice Breyer can hardly be thought to have been unaware of the immense differences between the problems posed by an alleged lack of "core consent," and the problems posed by a claim that consent did not go "so far as this."[102] And so,

- To exclude "consent implied from mere conduct" is one thing. We recall that this whole notion of requiring a somehow particularly explicit consent to arbitral jurisdiction was seized on by Justice Breyer largely as an interpretive device, a focused response to a particular dilemma faced by people like Mr. Kaplan who would otherwise have to steer at their peril between the twin dangers of default and of being inadvertently found to have "submitted."

- It is quite another thing to suggest that once we are satisfied that the parties have a valid agreement---once they have taken the trouble *to actually say something* about the arbitrators' power to decide---they still must be deemed to have fallen short.[103] Here the celebrated 'dictum," if pushed strenuously in the service of "plain meaning' beyond the underlying concerns of the case itself, must seem unduly restrictive and meddling. To understand where this "dictum" fairly came from is to understand its limited reach.

And this leads us right to the most critical point: The principal flaw in the latter proposition is that we are now---not of course with respect to Mr. Kaplan's challenge to

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agreement to grant [him] the authority to decide whether [respondent] waived the right to appoint [its own] arbitrator").

[102] As one member of the Court---unfortunately unidentified-----suggested in oral argument, "[w]henever you submit issues to arbitration, in effect you're consenting to a kind of rough-and-ready disposition of whatever your claims or disputes may be, and therefore there's no reason to sort of draw fine lines as to what you were rough and ready about." *See* Oral Argument, *supra* n. 92 at *43-*44.

See generally the discussion at text accompanying nn. 66-67 & n. 67 supra; cf. Joshua Fairfield, The Cost of Consent: Optimal Standardization in the Law of Contract, 58 Emory L.J. 1401, 1424 (2009)("unpacking" "consent to be bound" and "consent to the terms of an agreement"; "consent to be bound to an agreement must still be surrounded by all the pomp and circumstance of contract law to inform parties that they are about to enter into binding legal relations," "[b]ut that is quite different from the rules regarding knowledge of the terms of an agreement").

[103] See *Rau, "Arbitrability,"* at 314 fn. 80: "[I]n determining the existence of an 'arbitrable' issue, it would be monstrous to deploy the same 'presumption' against both respondent A, who claims that he had never signed an agreement in his individual capacity—or that his signature was forged—and against respondent B, who claims that his consent to arbitrate disputes over the sale of pork bellies did not extent to the arbitration of disputes over the sale of pig iron."

"core consent," but only here, only now---squarely in the midst of the draftsman's domain. Ungenerous reading would seem to serve very little function other than, in Llewellyn's words, to "invite the draftsman to recur to the attack":

> "Give him time, and he will make the grade."[104]

When our inquiry is turned into a mere exercise in parsing the conventional pre-dispute arbitration clause, it is hard to take it seriously as an attempt to discern contractual intent. It can only degenerate quickly into an oversubtle game--- an exercise that should be foreclosed in any event by Justice Brennan's magisterial demonstration in *AT&T.*[105]

a. This is why any requirement of "clear statement"-- even if in theory made necessary by Justice Breyer's taxonomy--- is here so routinely and trivially satisfied. As I have already suggested, in practice the supposed lessons of *First Options* have now become marginalized---have dwindled into insignificance---to the point that to invoke them begins increasingly to sound like mere bluster and bravado:[106] Like the similarly quaint notion of "manifest disregard," this now serves primarily as a ritual warning---or better, a therapeutic expression of internal reassurance---to the effect that the court is not entirely a potted plant. But it must equally and increasingly seem hollow and perfunctory.[107]

b. And this is why our cabined view of *First Options* fits so neatly with later decisions of the Court, which have rounded out our understanding of its unguarded language. The world has not after all remained frozen in 1995, nor has the copious Supreme Court arbitration jurisprudence:

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[104] K.N. Llewellyn, Book Review [review of Prausnitz, *The Standardization of Commercial Contracts in English and Continental Law],* 52 Harv. L. Rev. 700, 703 (1939).

[105] See generally text accompanying nn. 82-85 & n. 85 supra.

[106] The oft-repeated presumption that courts, not arbitrators are to decide a particular arbitration-related matter has inevitably become little more than a "limited" and "narrow exception" to a more general imperative of arbitral competence. See *Bazzle*, supra n. 97, 539 U.S. at 452; see generally text accompanying nn. 77-85 supra.

[107] To be sure, limited or idiosyncratic arbitration clauses might perhaps present a court with "sufficient ambiguity" as to require some actual demonstration that an issue of scope had been entrusted to the arbitrators. E.g., Davis v. Chevy Chase Financial Ltd., 667 F.2d 160 (D.C. Cir. 1981)(clause provided that "the fair market value of the offered shares shall be determined by mutual agreement" and, in the absence of such an agreement, by arbitration; held, arbitrator exceeded his authority in ruling that respondent was contractually obliged to sell his shares; while an arbitrator's assumption of jurisdiction should be upheld "where the scope of arbitration is 'fairly debatable' or 'reasonably in doubt,'" "where, as here, language is employed that suggests a limited scope of authority for the arbitrator, a more rational inference is that the parties themselves intended to determine if an arbitral dispute existed, with the assistance of the court if necessary."). But in the run-of-the mill case, where the conventional "broad" form has not been distorted, this should be quite unnecessary.

- *Pacificare.* As we remember, the question posed here was whether a contractual provision barring the award of punitive damages should be understood to bar the recovery of treble damages under RICO.[108] Please note that if the arbitrators were to answer "no," then they have necessarily answered "yes" to a question that is functionally equivalent: "Were the parties willing to submit claims for RICO treble damages to arbitration?" That is, they have answered ""yes" to the question, "did the parties entrust the arbitrators with jurisdiction to decide RICO treble damages claims?" The result of compelling arbitration in *Pacificare,* then, was that *the coverage of the arbitration clause was made a matter for final determination by the arbitral tribunal.* And---in a throwaway footnote that speaks volumes---the Court added that "given our presumption in favor of arbitration, we think the preliminary question whether [the contract prohibits an award of RICO treble damages] "is not a question of arbitrability."[109]

  I would grateful indeed if someone could explain to me what the notion of "clear and unmistakable" could possibly mean today after *Pacificare*. Really: send me an e-mail.[110] Which, I wonder, is more suggestive: the inescapable

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[108]The district court had denied a motion to compel arbitration---concluding without discussion that the contract's restriction on punitive damages served to bar the recovery of treble damages under RICO. ["Dr. Kelly alleges RICO violations, which provide for treble damages. Treble damages are a form of punitive damages." In re Managed Care Litigation, 132 F.Supp.2d 989, 1001 (S.D. Fla. 2000), affirmed *sub nom*. In re Humana Inc. Managed Care Litigation, 285 F.3d 971 (11th Cir. 2002), reversed *sub nom.* Pacificare Health Systems, Inc. v. Book, 538 U.S. 401 (2003)]. It then went on to find these limitations unenforceable because they prevented the plaintiffs from "obtaining any meaningful relief" for their statutory claims. The Eleventh Circuit affirmed on the basis of the lower court's opinion. See generally n.73 supra.

[109] *Pacificare Health Systems,* supra n.3*,* 538 U.S. at 407 fn.2.

Now of course there may still remain open questions as to the congruence of the agreement---once it has been definitively interpreted by the arbitrators---with any external constraints of mandatory law. That is a separate matter, and the one that Justice Scalia thought "premature." I have of course my own view as to the correct answer; see *Rau, "Consent,"* at 143-46 (can we suppose that the Court "is carefully laying a trap for the unwary arbitrator---prepared to pounce and spring should he get it wrong"?); *Rau, "Trilogy,"* at 451 fn.57. But in any event all cackle about this arbitral decision being made "at an interlocutory stage" or "in the first instance" *is nothing but a reference to some potential subsequent judicial "second look"* at this question---which readily explains the Court's reference to Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995). None of this has anything whatever to do with *arbitral construction with respect to the "scope" of the agreement,* which is something that cannot be reassessed in later proceedings. I am not sure that these senses are kept distinct in the discussion in BORN, supra n.7 at 929-30 & fns. 397-98.

[110] When an officious visitor praised the merits of his own rather dull brother ("When we have sat together some time, you'll find my brother grow very entertaining"), Johnson responded, "Sir, I can wait." 2 James Boswell, The Life of Samuel Johnson 321 (Everyman's Lib. Ed. 1992). I guess I can too.

implications of the holding with respect to the allocation of decisionmaking authority, or the fact that *First Options* was not even mentioned?[111]

- *Rent-A-Center.* As we also remember, the parties' agreement told us expressly that the arbitrator, "and not any [court]," "shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this [stand-alone arbitration] Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable." [112] The claimant/employee conceded---as he really had to---that this text was "clear and unmistakable" in the sense required by *First Options.*[113] That made the claim of "unconscionability" simply irrelevant to the problem before the Court, and, for the Court, was abundantly adequate to send the claim to the tribunal.

  It is, however, the dissent's misguided invocation of *First Options* that really underscores how inconsequential the case has become: For Justice Stevens, the respondent's claim that the arbitration agreement was "unconscionable" "undermines any suggestion that he 'clearly and unmistakably' assented to submit questions of arbitrability to the arbitrator"; if the claim of "unconscionability" was accurate "it would contravene the existence of clear and unmistakable assent to arbitrate the very question [respondent] now seeks to arbitrate."[114]

  Now of course, a claim that a contract is invalid because "unconscionable" need not be in the slightest tension with a finding that the parties had delegated the power to decide this issue to their arbitrators---this after all is what *Prima Paint* is all about. But more fundamentally: *First Options,* as we have seen, represents *a heightened requirement of clarity* to overcome the ambiguity of conduct. It does *not* represent a *heightened requirement of validity* to overcome the usual contract-based defenses.

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[111] The Court does not cite *First Options*, nor (other than with respect to the exclusion of "punitive damages") does the Court even find it necessary to refer to the drafting of the contract's arbitration clause, or to its purported scope.

Quite similar to *Pacificare*---although, as happens more often than not, *Pacificare* is not even mentioned---is Congress Construction Co. v. Geer Woods, Inc., 2005 WL 3657933 (D. Conn.)("who decides the question of whether the parties intended to arbitrate consequential damage claims?"; held, this "threshold question of arbitrability" is for the arbitrators, "at least in the first instance"). In cases like this, "in the first instance" must of course mean, "subject to the usual § 10 standard of review." *Pacificare* is also not mentioned at all in *Alliance Bernstein Investment Research & Management, Inc*., supra n. 80 (was a "whistleblower" claim equivalent to a claim for "discrimination" that was expressly excluded from arbitration by the NASD Rules?; held, this is a question for the arbitrator.)

[112] Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2775 (2010).

[113] *Id*. at 2776, 2778 fn. 1. But cf. David Horton, Arbitration as Delegation, 86 N.Y.U. L. Rev. 437, 466 (2011)(in *Rent-A-Center* the Court "declined to adopt the "clear and unmistakable" rule that it had previously endorsed in dicta").

[114] *Rent-A-Center, West, Inc*., supra n. 112, 130 S. Ct. at 2784-85 (Stevens, J., dissenting).

> Of course, as an initial threshold matter "consent" to some form of arbitral jurisdiction is critical---that is what it means to be "satisfied" that we can find a "contract" within the meaning of § 2.[115] But there is no occasion at all to go

[115] Professor Bermann writes that in *First Options,*

> The Supreme Court held that parties may, if they do so clearly and unmistakably, delegate to arbitrators the question whether a contract binds a non-signatory. Thus, under *First Options,* even a party that steadfastly insists that it is a stranger to an agreement may by virtue of clear and unmistakable language in the contract, find itself having given a tribunal primary authority to answer that very question.

George A. Bermann, The Supreme Court Trilogy and Its Impact on U.S. Arbitration Law, 22 Amer. Rev. Int'l Arb. 551, 557-58 (2011).

The first sentence is conceded. The second sentence, however, does not follow from it, and I doubt that I would venture so far. (Homer, too, nodded.) See also George A. Bermann, Arbitrability Trouble, 23 Amer. Rev. Int'l Arb. 367, 375 (2012*)(First Options* "is predicated on dubious logic," for "it seems anomalous to base a jurisdictional determination on the wording of an agreement to arbitrate that allegedly never came into existence or too which the party sought to be bound asserts that it is a total stranger"); Karen Cross, Letting the Arbitrator Decide Unconscionability Challenges, 26 Ohio St. J. Disp. Resol. 1, 61 (2011)(if an arbitration clause both provides for a biased arbitrator and contains a delegation clause, "the implication" of *First Options* "is that any findings by the arbitrator as to whether the arbitration agreement is unconscionable must be accorded deference at the award enforcement stage"); Graves, supra n.44 at 281 (since the arbitrators' authority to decide their own jurisdiction "is based solely on whether the parties agreed to arbitration in the first instance," "any grant of such authority is arguably fundamentally flawed, as a matter of contractual consent, based on its inherent circularity").

I would hardly go so far because there is, after all, nothing whatever in *First Options* that can be read in any way to call into question the "Prime Directive" of arbitration----to the effect that no party can be bound to an arbitral award if he has not agreed to submit himself to the process. There is certainly no way to spin such a notion out of Justice Breyer's opinion, with its repeated----indeed, almost hypnotic----invocation of the concept of "agreement," "For one must enter into the system *somewhere,* and the notion of an arbitration clause that can be entirely self-validating---the product, apparently, of some curious process of autogenesis---is completely alien to our jurisprudence," *Rau, "Separability"* at 5; cf. *Roe*, supra n. 96 at 517 ("the terms of the contracting parties' agreement to arbitrate is not evidence that a non-contracting party . . . agreed to arbitrate"). By contrast, however:

- While we must not construe as "consent" the mere fact that Mr. Kaplan argued lack of jurisdiction to the "arbitrators," it is certainly possible to imagine a future Mr. Kaplan who chooses to be somewhat more explicit---who tells them that while he does not believe he is bound, "he thinks it best to entrust this issue to the panel for a final judgment, being willing to abide whatever the award may be." See n. 94 supra.
- Alternatively: One can imagine the parties' willingness to "delegate" to future arbitrators the power to decide *whether even their arbitration agreement itself is unenforceable*---despite challenges (say, for "unconscionability") that do not call into question---do not "go to"---do not impair the legitimacy of---the very agreement to delegate. This of course is *Rent-A-Center*. In such cases, of course, there must be *a "real"---that is, contractually valid---"delegation" of decisionmaking power*; see *Rau, "Trilogy,"* at 497; cf. id. at 503 (where a contractual provision requires a biased decision-maker a court will "[treat] a mere signature or any other indicia of 'bare formal assent' as simply irrelevant"); but cf. Bermann, supra n.4 at 48 (the Court in *Rent-A-Center* "did not indicate what the result would have been if Jackson had been found to challenge the delegation clause in particular").

These cases are perhaps as far as we can go---they are just this side of the permissible. But note that *in none of these imagined cases* can the resisting party---who is legitimately bound to any award---properly be considered a "stranger" to an agreement to arbitrate.

any further---that is, no "threshold" of enforceability that is higher, no burden of proof that is greater, than with respect to other contractual terms[116]---and thus no need to drag in *First Options* to frighten the horses.

V. The Dilemma of Institutional Rules

> The U.S. has no developed concept of international arbitration and I'm afraid it will never acquire it.[117]

To review the bidding to this point*:* We began, with *First Options*, with the posited legitimacy of a contractual allocation of decisionmaking power; we quickly moved to the more interesting question of just where the starting point should be---that is, what should be the appropriate default rule against which to judge whether any such allocation has taken place. And soon, in the predictable way the common law operates, we find ourselves talking about just what degree of explicit contracting around is necessary to reverse the background rule. Appropriately, as we have seen, not much. This impression is reinforced by what we turn to next, the common practice of fleshing out agreement through the use of institutional rules.

Let us begin with what should really not be contested territory: Shortly after the decision in *First Options*, the AAA responded to the hint dropped by Justice Breyer,[118] and revised its Commercial Arbitration Rules to take advantage of the space he had opened up:[119] Rule 7(a), we are told, was expressly "designed to address" the Court's suggestion in *First Options* that parties might wish "to submit the arbitrability question

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[116] Cf. Lepera v. ITT Corp., 1997 WL 535165 at *4(E.D.Pa.)(citing *First Options, "*there must be clear and unmistakable evidence that a party agreed to arbitrate before they are bound to do so").

Justice Scalia adequately cuts the ground out from under Justice Stevens on this point; see *Rent-A-Center, West, Inc*., supra n. 112, 130 S. Ct. at 2777 fn.1 (§ 2 does not, "of course," impose on a proponent the need to demonstrate that the validity of an agreement to arbitrate must be "clear and unmistakable"). Still, I'd like to believe that I made precisely the same point over a decade ago, in the fond hope that someone might be listening; see *Rau, "Separability,"* at 95 fn. 241 ("it would obviously be contrary to federal policy to suggest that the proponent must carry a higher burden than is usual in civil cases . . .with respect to other contractual terms").

[117] *See, e.g.*, Sebastian Perry, *Arbitration in the EU a "Nightmare"?*, 5(4) GLOBAL ARB. REV. 32 (July 9, 2010)(comments of Professor Mistelis).

[118] If " the parties agree[d] to submit the arbitrability question itself to arbitration," "then the court's standard for reviewing the arbitrator's decision about *that* matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate." *First Options,* supra n. 31, 514 U.S. at 943.

[119] Rule 7(a) of the Commercial Arbitration Rules now provides that "the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." (R. 15(1) of the AAA's International Arbitration Rules is identical, merely replacing "arbitrator" with "tribunal.") Five years later the AAA showed the same alacrity in exploiting the Supreme Court's hint, in *Bazzle,* that the question of "what kind of arbitration proceeding the parties agreed to" could also be a matter for arbitral determination----the "Supplementary Rules for Class Arbitrations" seem a similarly self-aggrandizing move to expand the domain of arbitration in response to no particularly vocal consumer demand.

itself to arbitration"---and was thus intended to constitute party agreement to the arbitrability of "jurisdictional disputes."[120]

American courts have drawn the obvious inference, now routinely holding that merely choosing to arbitrate under these rules is itself a decision to take advantage of *First Options'* celebrated "dictum."[121]

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[120] See American Arbitration Association Commercial Arbitration Rules Revision Committee, *Commentary on the Revisions to the Commercial Arbitration Rules of the AAA*, ADR CURRENTS, Dec. 1998, at 6, 7 ("The committee believes that by adopting these rules, parties agree to the arbitrability of such jurisdictional disputes").

In another publication, the AAA---this time without making the pointed reference to *First Options*---explained that the new rule was "designed to make explicit in the rules generally accepted principles of arbitral jurisdiction. By adopting these rules, parties agree to the arbitrability of such jurisdictional disputes." AAA, Commercial Dispute Resolution Procedures, Summary of Significant Changes, *quoted in* Richard W. Hulbert, Institutional Rules and Arbitral Jurisdiction: When Party Intent is not "Clear and Unmistakable," 17 Amer. Rev. of Int'l Arb. 545, 563 (2006). Hulbert points to the first sentence of this excerpt as an indication "that nothing of substance was being added," id. But this seems a clear case of overreaching: Such a disingenuous gloss on the rule can hardly be squared with the *second* sentence. All that is being made "explicit" here is the "generally accepted principle" that parties may readily enter into an agreement to take advantage of the *First Options* dictum. It seems fair, then, to conclude that the rule, "enacted in response to *First Options,"* was thus "specifically meant to satisfy the clear and unmistakable evidence standard," Avue Technologies Corp. v. DCI Group, L.L.C., 2006 WL 1147662 (D.D.C.) at *7.

The "legislative history" of the CPR Rules for Non-Administered Arbitration is almost as compelling: Rule 8.1 of these rules provides that "the Tribunal shall have the power to hear and determine challenges to its jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." The official "Commentary" concludes that under this rule, challenges to arbitral jurisdiction "are decided, at least in the first instance, by the Tribunal consistent with the U.S. Supreme Court's decision in [*First Options]."* See also n.111 supra ("in cases like this, 'in the first instance' must of course mean, 'subject to the usual § 10 standard of review'").

[121] See, e.g., *Avue Technologies Corp*., supra n.120 at *5 ("here there is no 'silence or ambiguity' in the concededly valid arbitration agreement," as the agreement "expressly incorporates the AAA rules, which designates . . . the *arbitrator* as the 'who' referred to in *First Options*"); Fallo v. High-Tech Institute, 559 F.3d 8734 (8th Cir. 2009)(arbitrator should determine "whether the students' tort claims were within the scope of the arbitration provision in [their] enrollment agreements"; "the act of incorporating [the AAA Rules] provides even clearer evidence of the parties' intent to leave the question of arbitrability to the arbitrator than does the act of incorporating [the NASD Code]," and incorporation of the AAA Rules "supersedes Missouri law regarding the question of arbitrability"). Cf. McLaughlin v. McCann, 942 A.2d 616 (Del. Ch. 2008)(while there is a "heavy presumption" that by referencing the AAA Rules the parties agreed " that the arbitrator, and a not a court, would resolve disputes about substantive arbitrability," if the agreement contains at the same time substantial "carveouts and exceptions to committing disputes to arbitration"----such as authorizing injunctive relief and specific performance in the courts---the presumption is "overcome"). Indeed as we have seen, courts are increasingly likely to attribute precisely the same effect to the canonical "broad clause" *even in the absence of any institutional rule*. See text accompanying nn. 78-83 supra.

See also Terminix Int'l Co., LP v. Palmer Ranch Ltd. Partnership, 432 F.3d 1327 (11th Cir. 2005). Here the claimant asserted that the arbitration agreements were unenforceable because they "illegally deprive [it] of statutory remedies" including punitive and treble damages. The court held that while such a challenge would "ordinarily" be a matter for judicial decision because "it ultimately goes to the validity of the parties' agreement to arbitrate," here the incorporation of the AAA rules means that the parties instead "clearly and unmistakably agreed that the arbitrator should decide." But in this case I doubt that

Now the current draft of the Restatement does take a different position, "reject[ing] those cases" and so rejecting the proposition that that the AAA Rules require judicial deference to determinations by arbitral tribunals of their own jurisdiction.[122] But I find this somewhat puzzling: Just what after all should we suppose to have been the *point* of the AAA's revision of its rules? Presumably the rules were intended to mean *something*---and so surely we are expected to provide some account of the contractual effect they are to have. If we can't take at face value what the drafters told us they were trying to accomplish, what was the point of the exercise?

- Were they perhaps trying to insure that arbitrators don't feel compelled to shut up shop as soon as a jurisdictional objection is made? (But what arbitrator has ever felt so compelled?)[123] Surely there was, at the time, no felt pressing need to act merely in order to codify the so-called "positive effect" of the doctrine of *compétence/compétence*?

- Or were they perhaps trying to create through contract a mechanism that would oblige a court to stay its hand, refraining from its usual course of adjudication, pending the ultimate award---at which time it would have the right to review any jurisdictional finding de novo? (Were they trying, that is, to incorporate into the Rules the French Code of Civil Procedure---and thereby restructure our entire system of judicial control so as to "mandate multiple stages of litigation"?)[124]

Can we agree that both of these scenarios are implausible in the extreme? But note that in the absence of some compelling alternative semantic account, there can simply be no *First Options* "ambiguity."

Or is the problem perhaps that the declared intentions of some AAA committee should not automatically be imputed to contracting parties, who may have chosen the rules without full awareness of their origin?[125] Now: We know that by agreeing to

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such a move was even necessary; *quaere* whether such a challenge truly implicates arbitral jurisdiction or "arbitrability" in the first place anyway; see Rau, "Trilogy," at 503-04 & fn. 235; Rau "Consent," at 143-45.

[122] Restatement, supra n. 74, at § 4-14 Reporters' Notes note e. ("de novo review of tribunal's scope rulings"; although "institutional arbitration rules" give arbitrators "the authority to determine their own jurisdiction, they do not expressly provide that the arbitrators have the final and unreviewable authority to determine" such issues"); see also *id.* at § 4-12 Reporters' Notes note d. (same apparently with respect to the existence or invalidity of the arbitration agreement)

[123] See n. 23 supra ("universal" agreement on the proposition that arbitrators "are not thought to be somehow obligated to pack up their papers and turn out the lights, as soon as one of the putative parties sends them a note objecting to their jurisdiction"); see also text accompanying n.41 supra.

[124] See text accompanying n. 34 supra.

[125] See Bermann, *Arbitrability Trouble,* supra n.115 at 377 (distinguishing between "clear and unmistakable evidence of the institution's intention" and a "demonstrat[ion] that the parties clearly and unmistakably share that intention").

Cf. Lustfield v. Milne, 2008 WL 5544410 (Pa. Com. Pl.). Here the court found no "clear and unmistakable evidence" satisfying *First Options* in the mere incorporation by reference of the AAA rules---

arbitrate under the AAA rules, the parties have consented to make these rules "part of" their contract.[126] What do we take this to mean? Of course, as with any other Contracts question, the subjective intentions of the contracting parties---in any event unknowable---are inconclusive---as, taken alone, are the subjective intentions of the drafters. The only inquiry is into what the contracting parties could and should have made of the text, given their "framework of common understanding"[127]---that is, their linguistic sophistication, their constructive knowledge of the circumstances (always "surrounding"), the "legislative history," the context, the jurisprudential back story---and then, of course, the preferences we are justified in ascribing to them in light of their presumed overriding desire to minimize their joint costs. [128] The result really shouldn't be up for grabs, as it repeats the narrative of emerging case law that we have already observed, in federal courts at every level---in which the subject of jurisdiction is increasingly regarded as "just one more dispute between the parties."

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writing rather naively that "if a drafting party is seeking an agreement of the parties to an arbitration clause which provides for the arbitrator to decide arbitrability, it is a simple matter to expressly say so"; "the drafting party through one sentence can clearly state that the arbitrator shall decide arbitrability disputes." I call this "naïve" because "you could easily have said so" is usually a pretty clear sign that a default rule has been imposed without any conscious choice or awareness; it is also "naïve" because the court seemed oblivious to the linguistic difficulties---to the minefield that references to "decide" and to "arbitrability" would invite courts to stumble into. On the relative insignificance of drafting concerns, see text accompanying nn. 103-05 supra.

In any event the court in *Lustfield* seemed relatively uninterested in the particular language of Rule 7(a)---and far more in the claim that the non-drafting party was not "aware of or even considered the possibility" that a reference to the AAA Rules "has anything to do with what is arbitrable": Since "what is arbitrable is a matter for the parties to decide," "one would not anticipate that it would be addressed in the rules of an entity that will serve as the arbitrator." Whatever that last sentence could possibly mean, it suggests that cases like *Lustfield* must be cabined in the growing body of "arbitration-in-contracts-of-adhesion law"---and thus must have little purchase with respect to the transactions between sophisticated commercial parties that we are mostly concerned with here.

[126] "The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules." AAA, Commercial Arbitration Rules, R.1(a).

[127] Cf. UCC § 1-303 cmt. 3.

[128] See the discussion at n.72 supra. So an interpretive exercise on the part of the tribunal with respect to the meaning of "fruit," see nn. 73-74 supra, or of "punitive damages," see text accompanying nn. 108-09 supra, will naturally be entitled to considerable deference. But note that this is not merely a question of acknowledging the comparative competence in contract construction for which arbitrators were presumably chosen: It is also to recognize that arbitrators will often be in a far better position than courts to appreciate the *submissions actually made by the parties in the course of the proceedings*---submissions which if properly understood can define---or alter or expand---the scope of actual consent. E.g., Hollern v. Wachovia Securities, Inc., 458 F.3d 1169 (10th Cir. 2006) (although the agreement did not expressly permit an award of attorneys' fees, the parties "in their submissions'" "may extend" the authority granted to the arbitrators; here both parties requested attorneys' fees in their submissions, and "in accordance with the parties' request, the arbitrators decided the issues of attorneys' fees"); American Postal Workers Union v. Runyon, 185 F.3d 832, 835–36 (7th Cir. 1999) (in interest arbitration, "the arbitrator interpreted the issue framed by the parties as encompassing more than a choice between [adopting one party's proposal in its entirety] and doing nothing"; "we give great deference to the arbitrator's understanding of the parameters of the issues presented for arbitration")

This common way of reading the AAA Rules has now become something of a meta-default rule---treating a contractual reference to the Rules as a simple "term of art"[129] that denotes the choice of a particular scheme for the allocation of power. Once the principle of reallocation has been admitted, much more should not be expected. In an analysis made familiar by Lon Fuller, to arbitrate under the Rules is now to adopt a ready-to-hand "form"---useful *to a court* for the "facilitation of judicial diagnosis," and useful, too, *to contracting parties* as a "legal framework" into which they may fit their actions; by offering them convenient "channels for the legally effective expression of intention," it thus serves as "a device for separating the legal wheat from the legally irrelevant chaff."[130] Like any default rule it is subject to contractual expression of a contrary intention by parties who find it unsuited to their needs---but the fact that it is never reversed in practice cannot be attributed entirely to inattention or inertia.[131]

So it is rather hard to discern just what we would gain by setting busily to work at parsing solemnly the text of marginally, trivially, variant formulations----ascribing importance, perhaps, to a clause that tells us that the arbitrators shall have the

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[129] Willie Gary LLC v. James & Jackson LLC, 2006 WL 75309 at *7–8 (Del.Ch.). At the same time the court noted that this would also "arguably be economically efficient as a general policy rule." And that in turn reminds us that the choice of a default rule will often be made, not exclusively in an attempt to reconstruct the tacit assumption so the contracting parties, but often, too, "in the interest of handicapping a contention that happens to be socially disfavored" or privileging a contention that is thought to be normatively desirable, see *Rau, "Trilogy,"* at 466 & fns. 113-14; Clayton P. Gillette & Steven D. Walt, Sales Law: Domestic and International 12-13 (2nd ed. 2009)("we might state a rule as a default rule to indicate a social preference, or to call special attention to the options presented by the default rule and ensure that parties who bargain away from that rule incur significant costs that might lead them to think seriously about the appropriateness of their actions").

[130] Lon Fuller, Consideration and Form, 41 Colum. L. Rev. 799, 801-04 (1941). Cf. Paulsson, supra n.48 at 612 fn.27 ("intended to save the parties ink---or perhaps mental energy").

Professor Bermann argues that if the parties' adoption of rules like the AAA's should really be deemed to constitute "clear and unmistakable evidence" of their intention to allow arbitral tribunals to determine their own jurisdiction, "then, by the same reasoning, so too would the parties' selection in their agreement of a place of arbitration whose *lex arbitri* contains such language"---an unacceptable result because the *First Options* presumption should not "be overcome so easily," Bermann, *Arbitrability Trouble,* supra n. 115 at 377 (referring to the UNCITRAL Model Law). But even if the choice of a seat can be viewed as instrumental behavior in Fuller's sense, we must not of course lose sight of this: that an agreement to arbitrate "in, or under the law of," Germany *can only ever have the effect that is attributed to it by the law of that state.* It is not apparent how an American judge could presume to read it otherwise---no matter what he or she would otherwise take *First Options* to mean. With respect to the general assumption that Germany's adoption of the Model Law actually had the effect of *barring* contracting parties from making even an *explicit* grant to arbitrators of final decisionmaking power with respect to their own jurisdiction, see *Rau, "Arbitrability,"* at 349 (citing German authorities, but "I confess I am hard put to understand why the Model Law should be thought to have any bearing whatever on this question"); 1 BORN, supra n.7 at 899, 908.

[131] Cf. Randy E. Barnett, Contract Is Not Promise: Contract Is Consent, 45 Suffolk U. L. Rev. 647, 660 (2012)("so far as freedom of contract is concerned, it sometimes does not matter what the 'gap filling' default rule is, so long as the parties had access to it"; "by remaining silent, they have consented to whatever term the law supplies," and "parties who do not contract around these default rules can realistically be said to have objectively manifested their consent to them").

"*exclusive authority* to resolve" disputes over the "applicability, enforceability, or formation" of the agreement,[132] or even that arbitration "shall be the exclusive dispute resolution procedure for Disputes under this Agreement and *no Party shall bring Disputes before any cour*t, except as appeals to arbitration awards are permitted . . ."[133] One would have to attribute to drafting parties a considerably higher level of awareness and attentiveness and self-consciousness than I am willing to do, to draw legal consequences from what are merely stylistic flourishes.

What the Restatement seems in particular to find lacking in the AAA Rules is that they do not go on to "prescribe any particular standard of review or measure of deference to the tribunal" should the question "[come] subsequently before a court."[134] But of course it is not common---nor is it even particularly seemly---for contracting parties to presume to craft "standards of review" or to tell courts with any specificity how they should go about their business.[135]

If none of this is particularly problematic, what has by contrast proven globally troublesome to American courts and commentators, is the uncomfortable tension between

- our pre-existing backdrop of domestic law, and
- an understandable if insidious desire to align ourselves with sophisticated Continental models.

Under any model, what is critical is the interplay between any given system of civil procedure and the agreement of the parties. And now we get to the real problem---which, of course, is that while the intent of the AAA Rules is clear, no one could have had anything like that in mind when the facially quite-similar rules of other arbitral institutions were drafted.

Certainly other familiar sets of international rules---like those of the ICC and of UNCITRAL---read as if they were intended to have an effect equivalent to those of the

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[132] E.g., *Anderson v. Pitney Bowes, Inc*., n. 87 supra.

[133] E.g., Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH, 2011 WL 1348438 (Del. Ch.) at *16 (also relying on the AAA Rules). Since this language may not in any event be taken literally [is a motion to compel under § 4 excluded? A motion to appoint arbitrators under § 5? A request for interim relief pending the formation of the tribunal?], it is not clear how [other than as an example of excess lawyerly caution] this could be thought to advance the ball much beyond what we would get in any event from a generic arbitration clause. See also *Systems Research & Applications Corp*., supra n.120 at 944 (in addition to the AAA rules, the court relied on a clause to the effect that "[e]xcept as otherwise specifically provided in this provision, neither party shall institute any action or proceeding against the other party in any court of law or equity with respect to any dispute which is or could be the subject of a claim or proceeding pursuant to this provision").

[134] Restatement, supra n. 74 at Reporters' Notes note *e.*

[135] See 1 BORN, supra n.7 at 934 ("This misconceives what is required under *First Options,* which is evidence of an agreement to arbitrate jurisdictional issues, not a waiver of judicial review of arbitral decisions"---and in fact express waivers of this type "have sometimes been held unenforceable under the FAA").

AAA when it comes to the matter of *compétence/compétence.* There are trivial textual differences that will inevitably be seized on--- that will then give rise to the usual arid semantic quibbles---but that ought not detain us.[136] Of course, it would betray remarkable linguistic naiveté to assume that words or collocations of words must always carry precisely the same significance without regard to context:[137] It seems obvious that the rules of the ICC, for example, were merely meant to restate party agreement to the arbitrators' *compétence/compétence*---at most a matter of chronological priority: That is, deeply rooted as they are in the premises and presuppositions of French procedural law, they were not intended in any way to amount to a final allocation of decisionmaking authority.[138] The *arbitrati* of other states -- precisely because they lack the *First Options*

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[136] See, e.g., Telenor Mobile Communications AS, supra n. 35, 524 F.Supp.2d at 350-51. En route to his conclusion that the UNCITRAL Rules were "insufficient" to constitute submission to "arbitral resolution on the issue of arbitrability," Judge Lynch parsed them exquisitely:

- The UNCITRAL language, he wrote ("[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction"), was "clearly [less] sweeping" than the ICC Rules ("[a]ny decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself"). I guess one can barely glimpse the point being made here, although one remains underwhelmed.
- And then Judge Lynch went on to note a contrast with the rules of the AAA: While the former provide arbitrators with the authority "to rule on [their] jurisdiction," by contrast, the UNCITRAL rules "only" [sic] "allow arbitrators to rule on objections to that authority." Emphasis in original. At that point one has to throw up one's hands.

In any event this restrictive view of the UNCITRAL rules has not been carried forward into later more authoritative Second Circuit jurisprudence; see Schneider v. Kingdom of Thailand, 688 F.3d 68, 73-74 (2nd Cir. 2012)(adoption of the UNCITRAL rules "is clear and unmistakable evidence of [the parties'] intent to arbitrate issues of arbitrability," so that a district court "must review the arbitrators' resolution of such questions with deference"); Thai-Lao Lignite (Thailand) Co., Ltd. v. Government of the Lao People's Democratic Republic, 2011 WL 3516154 (S.D.N.Y.) at *18 fn. 10, ***aff'd,*** 2012 WL 2866275 (2nd Cir.)(in this respect *Telenor* was "abrogated" by subsequent Second Circuit decisions).

[137] See n. 44 supra ("Despite the patent ambiguity of the word 'decide,' confusion of these two very different senses of the word is common and fatal to intelligent argument").

[138] See text accompanying nn. 8-22 supra; see also Yves Derains & Eric A. Schwartz, A Guide to the ICC Rules of Arbitration 77 fn.78 (2005) ("Ultimately, the Arbitral Tribunal's determination will usually be the subject of judicial control once the tribunal has rendered its Award ...."); W. Laurence Craig et al., International Chamber of Commerce Arbitration § 11.03, at 162 (2000)("The effect [of the ICC Rules], subject to *a posteriori* control by national courts, is that the arbitrators rule on jurisdictional questions"). See generally Hulbert, supra n.119 at 557-60 (a conclusive demonstration to the effect that these rules could never have been intended to constitute party agreement to any final determination by an arbitral tribunal with respect to its own jurisdiction----a determination that would be entitled to the usual deference extended to all awards).

Similarly, with respect to the UNCITRAL Rules, see id. at 570-71; David D. Caron et al., The UNCITRAL Arbitration Rules: A Commentary 445 (2006)(Rule 21 of the UNCITRAL Rules provides that the arbitral tribunal "shall have the power to rule on objections that it has no jurisdiction," but the "sole substantive concern" of the drafters was that this "could mislead parties, because questions as to the competence and jurisdiction of arbitrators were ultimately a matter for the courts to settle in accordance with the *lex fori*"). The LCIA Arbitration Rules swim in the same current; art. 23.1 confers on the arbitral tribunal "the power to rule on its own jurisdiction, including any objection to the initial or continuing existence, validity or effectiveness of the Arbitration Agreement," and art. 23.4 warns that "by agreeing to arbitration under these Rules, the parties shall be treated as having agreed not to apply to any state court or other judicial authority for any relief regarding the Arbitral Tribunal's jurisdiction or authority"---but with

backstory -- are likely to find even the possibility of such a reallocation illegitimate and heretical---"exorbitant,"[139] and "neither logical or acceptable."[140] (That an arbitral tribunal could possibly be the exclusive judge of its own jurisdiction may even be a result that is claimed---with a characteristic solipsism---to be "accepted nowhere.").[141]

Their experience, however, is simply not ours.[142]

My guess then is that the Restatement position[143] must be understood as an attempt to bridge -- by fiat if necessary -- the wide gap between the quite different preconceptions of U.S. and of foreign practice. But of course, it is in the nature of a bridge, that traffic may proceed in either direction: In an alien legal environment—

- seeing arbitration primarily as an emanation of the law of Contracts[144]---
- having only the backstory of *First Options* to look to—and
- indulging their increasingly frequent reticence to venture beyond apparent "plain meaning"[145]---

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the exception---and this alone of course speaks volumes---of possible recourse "following the [tribunal's] award ruling on the objection to its jurisdiction or authority."

[139] *See, e.g.*, PHILIPPE FOUCHARD ET AL., TRAITÉ DE L'ARBITRAGE COMMERCIAL INTERNATIONAL 410 (1996).

[140] Id. at 414-15. Other authors reluctantly admit this into the realm of pure theory, but---so axiomatic is the regime of de novo judicial control, and so alien the notion of any contractual variation---that it is deemed suspect and disfavored to the extent that they "practically never" manage to actually "come across it," see Pierre Mayer, *L'Autonomie de l'arbitre international dans l'appréciation de sa proper compétence*, [1989] 5 REC. DES COURS 319, 340-41.

[141] Emmanuel Gaillard, *Note* [to *Société Coprodag v. Bohin*, Cour de Cassation, May 10, 1995], *in* [1995] Rev. de l'Arb. 618, 621 ("*une telle consequence n'est admise ni dans ce pays, ni ailleurs*").

[142] The notion of *compétence/compétence* was first introduced into the ICC rules in 1931, when the rules were amended to provide that "in case the parties are in disagreement as to whether or not they are bound by an arbitration clause, the Court of Arbitration shall decide the issue." The delegation was originally to the Court of Arbitration because "it was not then considered that such a question could validly be submitted to an arbitrator" (the view was that this "involves a decision which necessarily *must be taken before the Arbitrator can commence to have any jurisdiction at all*"). Nevertheless it was feared that if parties were always required to await the decision of *a national state court* when arbitral jurisdiction was challenged, the entire arbitral process could be undermined: That the driving engine was thus the familiar calculus of procedural efficiency is made clear by the general recognition that there was, after all, "always the possibility of the court of law [ultimately] rendering the results of arbitration nugatory." See generally Derains & Schwartz, supra n. 138 at 77; Hulbert, supra n. 120 at 557-59.

[143] That is, the Restatement position with respect to what it means for the parties to incorporate into their contract the rules of the AAA; see text accompanying nn. 122-135 supra.

[144] *See, e.g.*, Perry, supra n. 117 (comments of Professor Mistelis)("the average educated American lawyer sees arbitration as nothing more than an extension of contract law, without getting into a discussion of the fact that arbitration is effectively a jurisdictional agreement"; "there is a fundamental cultural difference when it comes to arbitration on the two sides of the Atlantic"); *Rau*, *"Trilogy,"* at 502-03 (but to say that "the only serious inquiry ought to be one into the understanding and underlying assumptions of the contracting parties" does seem to be "most congruent with our usual view of the arbitration process as an integral part of a system of private ordering and self-determination"); Alan Scott Rau & Catherine Pedamon, *La contractualisation de l'arbitrage: le modèle américain*, [2001] Rev. Arb. 451.

American courts regularly overlook the difference in context that properly informs construction of a text. And so they have tended to view both the rules of the ICC[146] and those of UNCITRAL[147] as a sufficient grant to arbitrators-- similar in effect to the

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[145] See, e.g., Alan Scott Rau, Evidence and Discovery in American Arbitration: The Problem of "Third Parties," 19 Amer. Rev. of Int'l Arb. 1, 9-16 (2008)("the persistent fallacy of 'plain meaning'" in construing § 7 of the FAA; in addition to an "unimaginative and impoverished view of the capacity of language," "another feature these cases share, perhaps, is a certain sheepishness about continued adherence to American practice in the face of contrary sophisticated Continental models").

[146] E.g., Burnham Enterprises, LLC v. DACC Co. Ltd., 2013 WL 68923 (M.D. Ala.)(claimant argued that the arbitration clause in the "long-term purchase agreement" did not apply to the dispute, which arose solely under a separate "confidentiality agreement" not containing such a clause; held, the agreement's adoption of the ICC rules "provide[s] clear and unmistakable evidence that [the parties] agreed to have questions of arbitrability settled in arbitration, not in court," citing *First Options);* Shaw Group Inc. v. Triplefine Int'l Corp., 322 F.3d 115, 118, 124-25 (2d Cir. 2003) (an agreement calling for ICC arbitration "clearly and unmistakably" evidences the parties' intention that "the arbitrability of . . . [a] contract claim for attorneys' fees and costs was a question for the arbitrator"). It is piquant that this same reading of the rules of the ICC---deeming them to be at one with those of the AAA in constituting a delegation to the arbitrators of the power to determine their own jurisdiction---was apparently shared by Justice Breyer himself before his elevation to the Supreme Court; see Société Générale de Surveillance, S.A. v. Raytheon European Mgmt. & Sys. Co., 643 F.2d 863, 869 (1st Cir. 1981) (Breyer, J.) ("whether [the respondent] is correct in contending that the testing of missiles is so different from their transport that Change Order No. 8 . . . was meant to be outside the scope of the arbitrability clause is itself a matter for the [ICC] arbitrators").

It is routine of course to include "jurisdictional" objections among the issues contained in the Terms of Reference for ICC tribunals: Might this too constitute a submission to the arbitrators, empowering them to make a final determination on the matter? See CBS Corp. v. WAK Orient Power & Light Ltd., 168 F.Supp.2d 403 (E.D. Pa. 2001)(yes; respondent "agreed to submit to arbitration the question of whether the [tribunal] had jurisdiction to join [the successor to the parent company of a signatory] as a party"; significantly, the court also relied on the "broad arbitration clause" originally incorporating the ICC Rules, but somehow avoided any mention of *First Options* at all); cf. Republic of Serbia v. Imagesat International NV, [2009] EWHC 2853 (Q.B.D. Comm.) at ¶¶ 99, 106 (yes; "Serbia's challenge is precluded by its submission to jurisdiction in the Terms of Reference in terms which gave the arbitrator substantive jurisdiction"; had Serbia wanted to acknowledge only a provisional *kompetenz-kompetenz* jurisdiction this could have been clearly stated").

[147] E.g., Wal-Mart Stores, Inc. v. PT Multipolar Corp., 202 F.3d 280 (9th Cir. 1999)(similar holding under Article 21(1) of the UNCITRAL Rules; "the district court did not err in holding that the parties agreed to abide by a system in which . . . the arbitrator, rather than the district court, should decide whether the parties' disputes are arbitrable"). See also Republic of Ecuador v. Chevron Corp., 638 F.3d 384, 395 (2nd Cir. 2011)(BIT "incorporated by reference the UNCITRAL rule delegating questions of arbitrability to the arbitral panel through language nearly identical to the AAA [Rules]"; this constituted "clear and unmistakable evidence that the parties intended these issued to be decided by the arbitral panel in the first instance").

I know this is highly fraught---and much beyond my pay grade---but I am convinced that the celebrated *BG Group* case need not in any way be read to the contrary. In fact, the highly unusual terms of Argentina's "consent" to arbitration here suggests a limited and sensible qualification of the general assumptions underlying *Chevron*. As we know, the UK-Argentina BIT provides that treaty disputes "shall be submitted" to the courts of the host country, and then only to UNCITRAL arbitration if, "after a period of eighteen months has elapsed" from the time of such submission, the competent court "has not given its final decision." That the stipulated "gateway provision" *itself makes mandatory recourse to a court,* suggests---all the obligatory cackle about "procedural arbitrability" aside---that the challenge to arbitration should be deemed "jurisdictional" in the sense that it is forum-dependent: Phrased otherwise, there has

AAA Rules--of the power to make a binding determination of their own jurisdiction.

The tendency to believe that this is exactly what the parties contracted to do in their choice of institutional rules is exemplified by two very recent decisions of our increasingly benighted Second Circuit:

- *Thai-Lao Lignite*[148]

A Thai company and its Laotian subsidiary initiated an arbitration against the Government of Laos; under the terms of the "Project Development Agreement" the arbitration was to be held in Malaysia under UNCITRAL Rules. Before the tribunal the Government attempted to whipsaw the claimants in the familiar fashion---urging that the *parent* "lacked standing" because all its rights had been assigned to the subsidiary, and that the subsidiary "lacked standing" because it was not an original signatory to the Agreement.[149] But the arbitral tribunal ruled against it (holding that the parent was after all a signatory, and that the subsidiary was an "intended beneficiary"). And the award was confirmed, the court rebuffing a challenge to the effect that the tribunal had "exercised jurisdiction beyond the scope of the arbitration agreement"; "deference" to the tribunal's conclusions on "questions of arbitrability" was required because the parties had "delegated decision on these issues" to the arbitrators.[150]

"not yet" been consent to arbitration *as opposed to the judicial forum which would normally otherwise be competent.* See text accompanying n.71 & n.71 supra. It also suggests that despite the reference to the UNCITRAL Rules, the parties will hardly "have been surprised to have a court, and not an arbitrator, decide whether the gateway provision should be followed." Republic of Argentina v. BG Group PLC, 665 F.3d 1363, 1371(D.C. Cir. 2012). This does not strike me as an "oddity" but rather quite sane: If an arbitrator were empowered to rule definitively on *whether the prior duty to seize a court* was satisfied or excused, the entire point of requiring that a court first be seized is eluded. Cf. Bjorklund, supra n.6 at p. 5.

[148] Thai-Lao Lignite (Thailand) Co., Ltd. v. Government of the Lao People's Democratic Republic, 2011 WL 3516154 (S.D.N.Y.), *aff'd,* 2012 WL 2866275 (2nd Cir.).

[149] Id. at 2011 WL 3516154 *5. Cf. *Rau, "Consent,"* at 129 & fn. 180 (but "presumably the obligor in such cases will be expected to arbitrate with *someone").*

[150] *Thai-Lao Lignite (Thailand) Co., Ltd.,* supra n. 148, 2011 WL 3516154 at *12, *15, *17.

A separate challenge to the award was based on the fact that the tribunal had compensated claimants for "investment costs" actually incurred on "related contracts" by "related entities" under the same ownership----thereby, the respondent alleged, ""wrongfully exercis[ing] jurisdiction over" those entities. The court found it easy enough to rebuff this challenge on the simple ground that the tribunal had in fact exercised no such "jurisdiction" at all--- it had done nothing more than to "interpret the scope of a term" ["total investment costs'"] in the Agreement; '"the court must defer to an arbitrator's conclusions on contract interpretation and calculation of damages." Id. at *15-*16: It is indeed hard to understand why properly-appointed arbitrators should not be thought empowered to determine what damages "fall under" a particular contract---or whether all these transactions were intended to be "one scheme from the outset" or, as the respondent argued, "separate contractual schemes," cf. Reply Brief of Appellant, 2012 WL 990188 (March 15, 2012) at *2. Inherent in arbitral jurisdiction, surely, is the power to be wrong.

There is, I concede, authority to the contrary---which I am, then obligated to consider, in straightforward fashion, as "erroneous:" I am, for example, highly doubtful about the result in the recent English case of Peterson Farms Inc. v. C & M Farming Ltd., [2004] EWHC 121 (Comm.), [2004] 1 Lloyd's Rep. 603. Here the single signatory defendant was an Arkansas seller of poultry; an Indian company (C &

Now to begin with, we note here---once again---the same *First Options*-centric misunderstanding of the purport of the Rules. But we also note how closely *Thai-Lao* swims in the same current as similar cases in which no need was ever perceived to refer to institutional rules at all. I have demonstrated this elsewhere at length, to pretty universal indifference, but this is in fact how virtually all the decided cases can be rationalized: [151]

If an attempt is made to bind---against his will---someone who claims to be a "non-signatory," then we must of course ask the question asked of Mr. Kaplan: "Did you ever consent to arbitrate?"---and we must be fully satisfied with the answer before allowing things to go any further.[152] With respect to a *signatory* to the agreement, by contrast, such a question is simply "not presented."[153] We ask instead, ""Just what are the boundaries of your contractual undertaking?" "What are we to make of your undoubted, broad, generic, sweeping commitment to arbitrate disputes?" "Is this *the sort of thing* you agreed to entrust to the arbitrators?" When you think about it, we pose much the same sort of question ("what are the boundaries of your contractual undertaking?") when we ask someone who has undoubtedly agreed to arbitrate disputes over the sale of "fruit," whether his consent encompassed a willingness to arbitrate disputes over the sale of pecans.[154] Yes, that is admittedly a live question---for concededly an agreement

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M) bought live poultry ("grandparent birds") from it in an agreement containing a provision for ICC arbitration in London. C & M mated the birds to produce "parent" males, which were then sold on to other entities in the C & M group; these other entities in turn used the "parent" males to breed and produce broiler chicks. But the poultry turned out to be infected with avian flu. The arbitral tribunal awarded damages to C & M based not only on its own lost sales, but also based on losses (in the form of lost sales and lost market share) suffered by other C & M group entities; it found that C & M's right to make claims on behalf of the entire group was "a question of interpretation of the arbitration agreement ... including the intention of the parties": The seller "clearly understood" the "integrated nature of the poultry business" and that C & M was contracting "as agent" for the entire C & M group. In that posture of the case, the question whether the affiliated C & M entities were themselves entitled to seek arbitration of their claims, naturally did not arise; the total recovery to plaintiff was a way of *consolidating all related claims* arising out of the breach. Treating this as a matter of clause construction strikes me as an eminently sensible way to proceed. Nevertheless the court set aside "for want of substantive jurisdiction" that part of the award which covered the losses of the affiliated companies: But its decision seemed in no way to hinge on the scope of authority given to the tribunal, but instead on what appears to be a *de novo* review of the tribunal's legal conclusions: Under either Arkansas or English law (deemed identical) there was "no evidence to support" a finding of either of agency or estoppel "and the evidence there is contradicts it."

[151] See generally the discussion in *Rau, "Consent,"* at 102-135.

[152] See text accompanying nn. 49, 66, 115 supra.

[153] *Thai-Lao Lignite (Thailand) Co., Ltd.,* supra n. 148, 2011 WL 3516154 at *20.

[154] See *Rau, "Consent,"* at 98-99; cf. id. at 111 ("it has become a characteristic move in the development of American arbitration law, to (1) assimilate the question of a *signatory's* obligation to arbitrate to (2) the overall question of the *scope or coverage* of the arbitration clause, and to (3) presumptively allocate power over both decisions to *the arbitrators themselves*"), 125-27 (providing examples). See also PAULSSON, supra n.5 ("it may be that parties do not so much agree to arbitrate with a person as *with respect to a transaction or a venture"*).

For a recent, anodyne example, see Erichsen v. RBC Capital Markets, LLC, 883 F.Supp.2d 562 (E.D.N.C. 2012). Here the plaintiff had signed "risk disclosure statements" containing an arbitration clause; the defendant, an assignee, was held entitled to compel arbitration "even as a nonsignatory."

to arbitrate with X is not necessarily an agreement to arbitrate with Y[155] ----but by the same token, an "agreement to arbitrate disputes asserted within six years" is not necessarily an "agreement to arbitrate stale claims," either.[156]

So when it comes to interpreting manifestations of consent we are very close to the core competence of the arbitrator, who is not for that reason entirely an "officious intermeddler"---nor does the attempt to bind someone who has already agreed to arbitrate *something* clearly implicate the existence of his consent in the same way that Mr. Kaplan's consent was contested. Nor can I identify much of a policy aimed at punishing free riders. The *only* question then is what *sort of disputes* a party has entrusted to "*his" arbitrator*.[157] So we are in the same ballpark---within spitting distance so to speak---of the increasingly routine tendency of U.S. courts to deem this something that may fairly be left to the arbitrators themselves.[158]

Apparently it was not even argued that this question fell to be determined by the arbitral tribunal rather than by the court. But what does it mean for the court to say (as it did) that the motion to compel arbitration should be granted "taking into consideration . . . the strong presumption in favor of arbitration," 883 F.Supp.2d at 573----other than that this question is treated by the court precisely as a commonplace issue of "scope" and not one of the "existence of consent"?

[155] Cf. *Rau, "Consent,"* at 127 ("but precisely that same rhetorical device can be used" with respect to cases like *Howsam* and *Pacificare;* "this is all, always, just a question of framing. Just as in *Howsam* and Pacificare, an initial agreement to submit to arbitration permits us to temper somewhat the absolutism of our insistence on the usual understanding of consent---and to shift the burden on the parties to the agreement to draft in advance around any default rule").

But see *Petition for Rehearing*, supra n. 34 at *11, in which the respondent/Government of Laos argued that the arbitral tribunal's joinder of a non-signatory on a "third party beneficiary basis" was simply "not a decision of contract interpretation" [*sed quaere:* why not?], and did not involve a dispute over a "so-called 'what' question," but rather a dispute over "the 'who' question," a question "of fundamental consent." Note, though, that when Justice Breyer distinguished between the " 'who' question" and the "what" question in *First Options*, he, of course, was getting at something completely different---he was distinguishing between the level #2 question of what is deemed to be arbitrable, and the level #3 question of *who is to make the determination* of arbitrability. *First Options of Chicago, Inc,* supra n. 31, 514 U.S. at 943.

[156] "It is questionable whether one can speak of an 'arbitrator' at all in the seventh year," William W. Park, Amending the Federal Arbitration Act, 13 Amer. Rev. Int'l Arb. 75, 117 (2002).

[157] See *Rau, "Consent,"* at 121 ("the critical inquiry now becomes the [signatory's] 'expectation and intent when binding itself' to the agreement---and 'the most important indicator' of this is the scope of the issues that [it] had originally confided to 'its' arbitrator for decision").

E.g., Contec Corp. v. Remote Solution Co. Ltd., 398 F.3d 205 (2nd Cir. 2005)(claimant's "ability as a non-signatory to enforce the arbitration clause is, in the terms of the AAA rules, an issue pertaining to the 'existence, scope or validity of the arbitration agreement' between respondent and claimant's predecessor; as a signatory to the contract incorporating these rules, respondent "cannot now disown its agreed-to obligation to arbitrate *all* disputes, including the question of arbitrability"---"even if, in the end, an arbitrator were to determine [with finality] that the [underlying] dispute itself is not arbitrable" because the claimant cannot assert rights under the agreement); see also Oehme, van Sweden & Associates, Inc. v. Maypaul Trading & Services Ltd., 2012 WL 5396394 (D.D.C.) ("A signatory to a contract has clearly and unmistakably agreed to its terms, [although] that is not necessarily true of a nonsignatory").

[158] A recent decision by another panel of the Second Circuit, on similar facts, does seem to look in a different direction. In a 1996 agreement between the UN and the BNP, the BNP agreed to open an escrow account to receive Iraqi oil proceeds, and to issue payments for the UN"s "Oil for Food"

There is one final feature of the *Thai Lao* problem that seems to have been largely ignored, both by the courts and by counsel---it arises from the inconvenient fact that the seat of the arbitration had been in Malaysia. Just about the only reference to that subject in the district court was this oblique discussion in a footnote: While the Government of Laos had argued that enforcement should be refused on the basis of art. V(1)(a) of the Convention, the court noted that perhaps the challenge "would seem to fit more comfortably" within art. V(1)(c). But

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humanitarian aid program. The contract contained an arbitration provision incorporating the UNCITRAL rules. But in Republic of Iraq v. ABB AG, 769 F.Supp.2d 605 (S.D.N.Y. 2011), *aff'd sub. nom*. Republic of Iraq v. BNP Paribas USA, 2012 WL 1021032 (2nd Cir.)----a decision not cited in *Thai Lao* and virtually nowhere else---the court held that Iraq could not avail itself of the arbitration provision as a third-party beneficiary.

The case arose on competing motions to compel and enjoin arbitration and so, unlike *Thai Lao*, the specter of imposing wasted effort from an abortive proceeding was missing. The decision may also have hinged in part on what the court found to be the "plain language" of the arbitration clause, restricted to allowing only the "parties" (defined as the UN and the BNP alone) to invoke the process. But there are multiple and disturbing analytical problems:

- The district court found that despite incorporation of the UNCITRAL Rules, there was "simply no 'clear and unmistakable evidence' that [Iraq] and BNP agreed to arbitrate the issue of whether their dispute is arbitrable *for the simple reason that there is no contract between them*", 769 F.Supp.2d at 610 (emphasis added). If this is a feint towards relevance, it fails dismally; it is a blatant misreading of *First Options*---which at most merely requires some "clear and unmistakable" evidence *of the intent of the resisting party*: Why should we require more?
- The district court also stressed the absence of any "sufficient relationship" between Iraq and the UN or the BNP, 769 F.Supp.2d at 612. But in the third-party beneficiary context this seems to me to come dangerously close to an assessment of the TPB issue itself on the merits: All that should really be necessary is that "the arbitrators arguably, plausibly, colorably had jurisdiction to decide the case; and that the arbitration clause was drafted with sufficient breadth and generality so as to leave the final word on the matter" to the tribunal. See *Rau, "Consent,"* at 135 fn. 200 ("the appropriate gateway inquiry for the judiciary").
- In pursuing this "sufficient relationship" line, the district court stressed that Iraq was "not a corporate successor to the [UN] nor does it otherwise stand in the [UN's] shoes," 769 F.Supp.2d at 611; see also 2012 WL 1021032 at *2 ("unlike Contec Corporation, Iraq has no claim to be in any sense a 'party')": That points to considerations which might just possibly be relevant in "successorship" or "estoppel" cases like *Contec,* supra n. 157---but which (as the court failed to recognize) are wholly beside the point in a third party beneficiary situation----where such a "test" can never, by definition, be satisfied. For a similarly blinkered view, see also QPro Inc. v. RTF Quality Services USA, Inc., 761 F.Supp.2d 492, 498 (S.D. Tex. 2011)(ICC arbitration; to allow a "nonsignatory to compel a signatory to arbitrate issues of arbitrability" is limited to cases where the nonsignatory "essentially stood in the shoes of a signatory to the arbitration agreement when defending the suit").

As I said above, this is concededly a "live question": As the court warned in *Contec,* "just because a signatory has agreed to arbitrate issues of arbitrability with another party does not mean that it must arbitrate with *any* non-signatory," *Contec*, supra n. 157, 398 F.3d at 209 (emphasis added)---and so some screening function is necessary (something, by the way, that is usually furnished by a rebuttable presumption of arbitrability). But I very much doubt whether an arbitral award that purported to construe the contract and to grant Iraq arbitral standing as a TPB could have been annulled.

> in any event, given that courts review arbitrability issues even though arbitrability is not specifically mentioned in Article V, the fact that Respondent's jurisdiction objections are not grounded in the text of Article V does not foreclose its arguments.[159]

Now this is an obvious error, because we know that the obligation of a U.S. court to recognize and enforce Convention awards is limited only by the grounds for refusal specified in art. V---and that these grounds are "exclusive."[160] There is thus a need for some textual hook, and a proper search should lead us to *both* the sections mentioned. And since these are most sensibly read together, I would conclude that the scope of the signatory's obligation [what is "within the terms of the submission to arbitration"][161] must---equally with the "validity" of any agreement to which he may be bound[162]--- be viewed through the lenses of the law of the seat that he has chosen.[163] Indeed the former should be true a fortiori.

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[159] *Thai-Lao Lignite (Thailand) Co., Ltd.,* supra n. 148, 2011 WL 3516154 at *15 fn.8. On appeal the Second Circuit made no reference to the Convention at all.

[160] See Alan Scott Rau, The Errors of Comity: *Forum Non Conveniens* Returns to the Second Circuit, 23 Amer. Rev. Int'l Arb. 1, 12 (2012)("it is usually, and authoritatively, and properly, assumed" that the Art. V grounds for the refusal of recognition and enforcement of awards are "exclusive"); 2 BORN, supra n.7 at 2337, 2721-22("exclusive and exhaustive").

[161] This is art. V(1)(c).

[162] This is art. V(1)(a).

[163] See ***Rau, "Jurisdiction,"*** at 168-69 (as the choice of a seat is properly viewed as "an exercise of autonomy," the law of that state is "a plausible candidate, and in fact considerably more plausible than its many competitors"); more recently, see Sulamérica Cia. Nacional de Seguros SA v. Enesa Engelharia SA, [2012] EWCA Civ. 4638 (C.A.)(concluding, after an exhaustive review of authority and the display of some shrewd good sense on the subject of what "it would be very surprising if the parties had intended," that English law as the chosen law of the seat was the "proper law of the arbitration agreement," "notwithstanding the express choice of Brazilian law as the law governing the policies").

This particularly ought to inform results in the many cases (similar to *Thai-Lao)* where a challenge "implicates the 'consent' of the contracting parties in only the most tenuous way," for example,

- where it is sought to bind an undoubted party to submit to arbitration with a non-signatory. Cf. 1 BORN, supra n.7 at 1214-18 ("issues of consent and assumption [as well as issues of "third party beneficiary status"] are questions directly concerning formation of the arbitration agreement, and would therefore be governed by the law applicable to the arbitration agreement under most conflicts systems"); Felman Production Inc. v. Bannai, 476 F. Supp. 2d 585 (S.D. W. Va. 2007) (agreement called for arbitration in London [and was also to be governed by English law]; the court denied a motion by the defendant/nonsignatory to compel arbitration; "federal law" does not govern here, and "it is a general principle of [English] arbitration law that the agreement only binds the parties to the agreement to arbitration").
- Or where the legal challenge involves the scope of the arbitration agreement. Cf. Yavuz v. 61 MM Ltd, 465 F.3d 418 (10th Cir. 2006) (Swiss choice-of-law clause and "place of courts is Fribourg"; "it is hardly obvious what claims" are governed by the clause; since "the words may take on different meanings depending on the law used to interpret them," "a court can effectuate the parties' agreement concerning the forum only if it interprets the forum clause under the chosen law"). Yes, I know there is abundant authority to the contrary; see, e.g., Chloe Z Fishing Co., Inc. v. Odyssey Re (London) Ltd., 109 F. Supp. 2d 1236 (S.D. Cal. 2000), holding that "federal substantive law" as "the supreme law of the land" governs whether the arbitration clause "encompasse[s] the subject of the parties' present dispute" (although "admittedly, "there is a

In *Thai-Lao* the choice of the applicable law was apparently uncontested, and the content of Malaysian arbitration law unexplored---and so in the absence of any curiosity about the question, it would be natural to fall back on U.S. law as filtered through *First Options*.[164] Or course things will not always be so easy: An agreement to arbitrate under the AAA's Commercial Rules in France---if one can imagine anything so grotesque---would clearly require a U.S. court, when asked to compel arbitration, to

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colorable argument that either the choice-of-law provision governing the P & I policies or the reference of disputes to 'arbitration in London' . . . subjects the scope of the arbitration clause to English law," id. at 1252). But note that *Chloe Z,* like most other cases with similar holdings, arose in the context of a motion to compel---and there seems to be a common and unfortunate failure here to appreciate that the choice-of-law analysis expressly mandated for *awards* by art. V(1)(a) "equally governs the enforceability of arbitration *agreements,"* see *Rau, "Jurisdiction,"* at 168 fn. 307.

The Restatement would at least seem to agree that federal law (whether the "supreme law of the land" or not) should have no role *ex proprio vigore* in a case like *Thai Lao*---although the fact that the parties happened to have chosen New York law to govern the Project Development Agreement might be deemed significant. It presumes, though, that for the purposes of art. V(1)(a)—and in the usual absence of anything more explicit---"the law to which the parties have subjected" their agreement to arbitrate is the *contract's general substantive choice-of-law clause*; it is only where "the parties have neither selected any law to govern the arbitration agreement, nor included in the contract a general choice-of-law clause," that the law of the seat "govern[s] the issue." Restatement, supra n. 73 at § 4-12(c) & *cmt. c*. An identical rule is laid down for the purposes of art. V(1)(c); see id. at § 4-14(b) & *cmt. b.* I express some hesitation about this in *Rau, "Jurisdiction,"* at 169 fn. 311 ("after all [the contractual choice of substantive law] is largely just a surrogate for a conflict-of-laws analysis which would have proceeded in its absence"; "I also wonder whether the suggested default takes adequate account of the usual abstraction of the arbitral process from the actual place of performance of the underlying transaction" "or, for that matter," of "the obvious need to read Article V(1)(a) as congruent with the consecrated readings of Article V(1)(e)."

Finally: Is it possible that a fundamentally different analysis is called for when a court is asked (as in the cases we are dealing with) to determine the scope of an arbitrator's authority under a BIT? To say that the agreement in such cases should be subject to no national body of law at all---but rather to some autonomous floating body of "public international law"--would not seem to me to advance the ball very far. [To that effect, though, see Republic of Ecuador v. Occidental Exploration & Production Co., [2005] EWHC 774 (Q.B.D. Comm.) at ¶¶ 62-63 (as "there is no doubt" that the BIT is "governed by public international law," "it would be logical" that the jurisdiction of the arbitrators ("i.e., the scope of the arbitration agreement"), was "governed by the same law"), aff'd, [2005] EWCA Civ. 1116 (C.A.) at ¶ 13 ("although neither side suggests that the answer is crucial to its own case").] The very least one can say is that in the context of the Convention, such a view hardly eliminates the task of giving meaning to art. V---nor, certainly, does it render any more sensible the invocation by the court in *Thai-Lao* of *First Options.* In any event the Convention was not directly implicated in *Occidental Exploration*--- since what was at stake there was not recognition of a foreign award, but merely the question whether Ecuador's annulment motion was a matter "justiciable in an English court." It might also be noted that the choice of a seat in *Occidental* had been made, not in the treaty or even by the parties, but by the arbitrators themselves---something that might be significant if (for whatever reason) one takes the view that any law put forward to govern the agreement must have been "capable of identification at the moment that the agreement is made," [2005] EWHC 774 at ¶ 62.

[164] Cf. Al-Salamah Arabian Agencies Co., Ltd. v. Reece, 673 F. Supp. 748 (M.D. N.C. 1987)("arbitration in Riyadh"; "the parties have not briefed the court on the issue of whether an unsigned written contract may be binding under Saudi Arabian law," but "given the policy of the [FAA] in favor of arbitration, the court will assume that the contract is binding").

adjust its usual expectations with respect to how the contract should be read.[165] And faced with an ultimate French award, could a U.S. court possibly defer to an arbitral ruling on jurisdiction by giving the Rules greater currency than they would have under the chosen law? I suspect not, although vacatur there----under the *lex arbitri* to which the parties had subjected their proceeding---on the ground that the tribunal had "wrongfully taken jurisdiction,"[166] would obviously and conveniently short-circuit the inquiry.

Schneider v. Kingdom of Thailand[167]

Thai-Lao was followed just a month later by another Second Circuit decision: The judgment of a different panel, *Schneider* equally dealt with a motion to confirm a foreign award rendered in an arbitration arising under a BIT and conducted under the UNCITRAL Rules. A German company had been a "promoter," investor, and participant in a tollway project to which the Government of Thailand had granted a concession; it alleged that its investment had been "thwarted" by the wrongful act of the Government in not properly fixing the levels of tolls for the highway. The relevant treaty between Thailand and Germany only protects (and only grants the right to arbitrate to) investors who have made "approved investments." An arbitral tribunal in Geneva "agreed to consider issues of jurisdiction at the outset," first found that the claimant was a "protected investor" because it had made an "approved investment," and later issued an award in its favor.[168]

- The district court granted a motion to confirm. It found *First Options* "inapposite" and "inapplicable" for the reason that Justice Breyer's opinion had "only considered" "the question of agreement formation"---that is, it had only addressed the case where a respondent is arguing that he was "never party to an agreement to arbitrate," and had never "agreed to arbitrate disputes at all."[169] But here, by contrast, the issue was supposedly one of "scope":

[165] While it may be "unclear what the effect under French law is of an arbitration agreement that confers on the arbitral tribunal the power finally to decide jurisdictional disputes," 1 BORN, supra n.7 at 903, it is at least certain that under that law, the presumption against construing any agreement to give it such a meaning will be irresistible. See text accompanying nn. 138-41 supra.
[166] See Decree of January 13, 2011, art. 1520(1)("*s'est déclaré à tort compétent"*).
[167] Schneider v. Kingdom of Thailand, 10 Civ. 2729 (S.D.N..Y. March 14, 2010), aff'd, 688 F.3d 68 (2nd Cir. 2012).
[168] Art. 2(2) of the 2002 BIT provides that the treaty "shall apply only to investments that have been specifically approved in writing by the competent authority" of the host state. The arbitral tribunal rejected a claim under the treaty for "creeping expropriation," but found that Thailand had violated art. 2(3) by failing to "accord such investments" "fair and equitable treatment and full protection." See Award of July 1, 2009, *in* http://italaw.com/documents/WalterBauThailandAward.pdf.
[169] 10 Civ. 2729 at *12-*13.

- So in these circumstances, the court concluded, the "standard to apply" was the canonical "strong presumption of arbitrability." (This familiar reference might suggest that the court thought that *it was, itself*, independently making the final determination that the arbitrators "in fact had jurisdiction").[170]
- Almost in the same breath, though, Judge Batts wrote that she thought it inappropriate to "conduct a de novo review" of the award. (This by contrast might suggest that the jurisdictional determination was presumed to be a matter best left *to the arbitrators themselves*, subject only to some unspecified level of deferential review).[171]

The conceptual confusion here is stark and, as we have already seen, not uncommon.[172] And the latter proposition, as have also already seen, is as a purported reading of *First Options* plainly and simply wrong.[173]

- A far better tack to have taken, a far better route to the same result, might have been to find *First Options* beside the point for a different reason---for the reason that the Government's challenge was not even to the tribunal's "jurisdiction" (or if you prefer, to "arbitrability") in the first place. An analogy might be drawn here to the question (discussed earlier) whether a given dispute can "still" be heard by arbitrators after contractual time limits have elapsed:[174] Note, at least, that in

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[170] This of course is what such a "presumption" is usually taken to mean: The Second Circuit, however, sensibly did not read the district court opinion in that sense, assuming instead that the lower court had "declined to determine independently" the question of jurisdiction and had simply deferred to the tribunal. 688 F.3d at 71-72.

[171] This notion, I suppose, would involve some other sort of presumption---not one of actual jurisdiction---but rather of a "presumption of jurisdiction to decide jurisdiction," see 10 Civ. 2729 at *13 fn. 6 (because *First Options* is inapplicable, "the court does not need to reach the question of whether there was clear and unmistakable evidence that the parties intended that the question of arbitrability be decided by the Arbitrators").

[172] See text accompanying nn. 73-76 supra (on this point "slippage, muddle, and lack of rigor are inevitable").

[173] See text accompanying nn. 77, 98-100 supra; see generally *Rau, "Arbitrability,"* at 309-313 ("a hasty reading, or wishful thinking, on the part of some lower courts has led them to conclude . . . that once we can find some 'valid arbitration agreement,' to which a respondent has assented, [*First Options]* no longer comes into play at all"; this represents "a misapprehension of Justice Breyer's account of default rules in arbitration," a distortion of his careful analytical scheme, for "*whenever* the authority of an arbitrator to decide is in question, the presumptions laid down in [*First Options*] must come into play").

Cf. Dimolitsa, supra n.16 at 322-24. The author, relying on *First Options*, asserts that in the United States the notion of *compétence-compétence* "is apparently not accepted" when there is a question as to who is bound by the arbitration clause "[*la portée ratione personae*]" but it is, on the contrary, with respect to determining the "*la portée ratione materiae"* of the clause. This is the common error I've just referred to---compounded with the poignant belief that Latin tags can actually contribute to moving an argument forward.

[174] See text accompanying nn. 68-71 supra; see also generally *Rau, "Consent,"* at 135-40 ("not yet" or "no longer" any "consent to arbitrate"; "[t]he parties should not have to run the risk of seeing a rule of liability converted into a rule of 'arbitrability'").

both cases the challenge goes not to the appropriate forum, but to the "validity of the claim," not to the authority of this particular tribunal, but to whether recovery is hopeless---that is, whether in any forum the claimant is precluded from pursuing any cause of action at all. We can therefore conclude that in both cases, any reference to *First Options* or to "arbitrability" would be a simple category mistake: As the absence of an "approved investment" will definitively doom the claim--as the claimant has no recourse to any alternative forum for a treaty violation[175]---as the impugned conduct of the state is simply irrelevant if the investor cannot get in the door---the parties' expectation was presumably that this "gateway" question should be, at the outset, entrusted for a final decision to the tribunal itself.[176]

- The Second Circuit affirmed the lower court's judgment of confirmation---but in doing so came up with still yet another rationale justifying deference to the award: *First Options*, it held*, did indeed* provide the governing standard---because the existence of an "approved investment" was a question of "arbitrability"---and so, before making the decision itself, it was the job of the district court to first determine whether there had been "clear and unmistakable evidence of the parties' intent to submit the question to the arbitral tribunal."[177] But nevertheless the *First Options* standard was satisfied by the decision of the parties to arbitrate under a body of rules *having precisely that effect*.

  Analogies are always a risky business, and while the court did not say so, it is quite possible that it was in thrall to a competing one: It is, for example, generally taken as a given in securities cases that whether a claimant is a "customer" of a

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[175] See Award of July 1, 2009, supra n. 168 at ¶ 12.30 ("Whatever contractual or company law remedies [the Claimant] may have had are irrelevant in the present case which is strictly one based on the international law rights granted to the Claimant as an "investor" by the 2002 Treaty").

[176] It would probably be kinder to pass over the rest of Judge Batts' opinion in relative silence. After dismissing the challenge to the jurisdiction of the tribunal, she then went on to consider whether the award should be "vacated" under § 10 of the FAA (or under the fugitive common-law standard of "manifest disregard"). She noted that Thailand "has not filed a formal motion to vacate the award" [what, I wonder, could possibly be the explanation for *that*?]; she then nevertheless decided *sua sponte* to treat Thailand's opposition to the claimant's motion to confirm as in any event equivalent to a motion to vacate. 10 Civ. 2729 at *13 fn. 7. [Did I mention that the seat of the arbitration was Geneva?]

And after "a thorough review," the court was "satisfied that the Arbitrators' award meets the light burden imposed by section 10(a) and the 'Manifest Disregard Standard.'" Given this "analysis," it is perhaps not surprising that art. V was never even referred to. And a fortiori, the notion that a Swiss *lex arbitri* might be relevant did not rise to the level of anyone's consciousness---although here, unlike the case of Malaysia, we might be able to make some pretty shrewd guesses as to the content of the relevant law, see 1 BORN, supra n.7 at 904-07 (that non-Swiss parties may waive the right to seek annulment, or exclude some of the otherwise-applicable grounds for annulment, suggests that Swiss law would "allow the arbitral tribunal to make a final decision on its own jurisdiction in at least some cases").

Arbitration is not for dabblers. But why---why, at this late date---do some of our federal courts have such difficulty even in coming to terms with the very existence of the Convention?

[177] *Schneider,* supra n. 167, 688 F.3d at 71.

brokerage house---something that alone allows him to trigger FINRA arbitration---is to be deemed a "jurisdictional" matter for the court. (That is equally the case, for that matter, with respect to the question whether a party to a contract for the sale of apples is obligated to arbitrate a dispute involving the sale of oranges.) [178] *Schneider* too could perhaps similarly be characterized as a question of "scope" if the inquiry is framed in this way---becoming, that is, an inquiry into whether this "arbitration clause in a concededly binding contract applies to [this] particular type of controversy."[179]

But *even if* such a frame---such a characterization---is accepted, we are merely returned to the qualifications imposed by everything that has gone before: As I suggested earlier, once we are satisfied that there has been in these circumstances some "core consent" to the arbitration process, then---whatever sort of "threshold" *First Options* is taken to have imposed---it makes sense for any "jurisdictional" requirement to be considerably relaxed. We recall, in other words, that the generic broad clause, or some institutional rule of *compétence/compétence*, can readily be taken---and has commonly been taken---to constitute the necessary grant of authority to the tribunal to "arbitrate arbitrability"---subject only to the limited review provided in an applicable statute.[180] It was on this basis, then, that the Second Circuit was able to craft an alternative ground for confirmation in finding that "that is precisely what occurred here."[181]

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[178] For FINRA cases, see, e.g., *Bensadoun*, supra n.7; Morgan Keegan & Co., Inc. v. Drzayick, 2011 WL 5403031 (D.Idaho)(the "threshold question of whether [claimants] are 'customers' [is] a legal matter that should be resolved by the court"; "it does not appear [claimants] can establish that some brokerage or investment relationship existed" with the respondent, and while the respondent "may have provided information on the Funds for the initial public offerings, [claimants] did not purchase their shares in the Funds during the initial public offerings, so it would be unfair to create a customer relationship" on that basis). To the same effect is UBS Financial Services, Inc. v. Carilion Clinic, 706 F.3d 319, 324 fn. 2 (4th Cir. 2013), holding that "whether a person requesting arbitration is a customer must be resolved [by the court] to determine the existence of a contract to arbitrate, not the scope of an arbitration agreement": "Consequently" we address the question "without considering the presumption in favor of arbitration." [Note that any proposed distinction between "existence" and "scope" in this context rests, as I have argued throughout, on a misreading of *First Options*; "what is interesting is not so much the abstract proposition that at some level 'it is for the court' to vet arbitral jurisdiction, as it is *the sharply restricted nature of the inquiry";* see text accompanying nn. 77, 82, 98-100 supra.

Of course this analogy, if it is was at all in play here, would be deeply flawed, as the challenges in these cases--- true "jurisdictional" challenges---seem entirely forum-dependent: The purchasers/investors/claimants there---even if the FINRA rules did not apply to them, and the FINRA arbitration mechanism unavailable to them---always had open the possibility of pursuing the same statutory and common law causes of action (in the usual litany, for "breach of fiduciary duty, fraud, negligent misrepresentation, and violation of the Exchange Act") in a court of law. This is true however the challenge is framed. Same thing, of course, for the party to the sale of oranges.

[179] See text accompanying n. 53 & n. 53 supra (quoting from Justice Breyer's opinion in *Howsam).*

[180] See generally the discussion in the text accompanying nn. 72-85 supra.

[181] *Schneider,* supra n. 167, 688 F.3d at 72.

> I suppose that all in all, this does constitute a somewhat less satisfying rationale than what has gone before---but the important point, of course, is that as it leads to the same result, it doesn't much matter.[182]

As you can tell, then, confirmation of the award in *Schneider* was truly "overdetermined."

If this seems at all plausible, it returns us to the thrust of earlier sections of this paper and summarizes the whole narrative neatly: It is hard to avoid the conclusion that in a case where U.S. arbitration law appropriately governs the agreement, the rules of arbitral institutions---however they are construed---are as likely as not to amount to a makeweight; and it does no great harm to assume that they may be properly treated in the end as tangential to any actual decision.[183]

Among all the advantages we have canvassed for this state of affairs, another must be that it contributes further to the marginalization of *First Options* as something to be reckoned with---a process, as we have seen, that has been well under way for some time. (Of course the case will continue to evoke the obligatory, all-purpose citation, before one passes in short order to something more interesting.). I would be hesitant to claim much more---but perhaps we could also mention the advantage of drawing our particular attention to the existence of competing default rules that arise out of different legal cultures---something that will properly enter into our calculus with respect to the choice of a seat. A corollary would see even transnational cases remaining within the framework of the present complex structure of our common law---notwithstanding the blandishments and siren calls of "international consensus." Once again, the interest is

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[182] The same lesson is to be drawn from *Republic of Ecuador*, supra n. 147 at 395. Here Ecuador asserted that Chevron was "estopped" from asserting, or had "waived," its right to arbitration under the U.S.-Ecuador BIT. The court noted that "waiver and estoppel generally fall into" the category of issues that would always, in any event, be "presumptively for the arbitrator"---relying on *Moses Cone* and in particular*, Howsam.* But "even assuming" that Ecuador's arguments instead "go to Chevron's ability to initiate arbitration, and thus are fairly characterized as 'questions of arbitrability,' there is 'clear and unmistakable evidence' that the parties intended these issued to be decided by the arbitral panel in the first instance": For the BIT incorporated the UNCITRAL rules, which "delegat[ed] questions of arbitrability to the arbitral panel through language nearly identical" to the rules of the AAA.

[183] See, e.g., *Silec Cable S.A.S*., supra n. 81. The agreement there called for ICC arbitration to be held in Pittsburgh. An action to enjoin the arbitration was dismissed on the ground that it was for the *arbitrators* to determine whether the "claims set forth in [the] arbitration demand are arbitrable." There was indeed "clear and unmistakable evidence that the parties had intended" this: To begin with, the principles derived from the cases interpreting the AAA rules were in fact "even stronger in reference to an arbitration agreement incorporating ICC Rules, given that ICC Rules *require* the arbitrators to determine whether a claim is arbitrable if that issue is raised by one of the parties," 2012 WL 5906535 at *18 (emphasis in original). But what is more---"in addition"---the "broad, unlimited and unambiguous language" used in the arbitration clause "clearly and unmistakably convinces the Court that the parties intended that the arbitrator decide the scope of any claims." Id. at *19.

See also *Congress Construction Co.*, supra n.111 (incorporation of AAA Rules "gives the arbitrators the power to decide questions of arbitrability," but "second, and in any event," the broad language of the arbitration clause "is itself sufficient to permit the Court to conclude that it is for the arbitrators to decide" such questions).

less in exercises that purport to call for the interpretation of language, and rather more in the identification of appropriate default rules of construction; conscious choice on this subject should always track our particular preconceptions with respect to the primacy and contours of party expectation---and above all, with respect to the kind of process we want to encourage.